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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1950

No. 87

WALTER K. WARREN, PETITIONER,

vs.

THE UNITED STATES OF AMERICA, AS OWNER OF THE STEAMSHIP "ANNA HOWARD SHAW", ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MAY 24, 1950.

CERTIORARI GRANTED OCTOBER 9, 1950.

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1945		
March	**2**	**Filed Libel**
March	**17**	**Filed Letter from the Dept. of Justice—Form**
March	**27**	**Filed Affidavit of Service**
April	**9**	**Filed Answer of American South African Line Inc.**
April	**12**	**Filed Stipulation for costs**
April	**18**	**Filed Exceptions to Respondents' answer**
"	"	**Filed Notice of Argument on exceptions to defense etc. on 4/24/45**
April	**25**	**Filed Answer of U. S. A.**
May	**26**	**Filed Memo #15932. Exceptions Overruled—Rifkind, *J.***
May	**31**	**Filed Order overruling exceptions. Rifkind, *J.***
Aug.	**3**	**Filed Interrogs. propounded to Libelant**
Oct.	**10**	**Filed Answers to interrogs.**
Oct.	**29**	**Filed Exceptions to interrogs.**
1946		
June	**14**	**Pre-Trial Hearings—Marked Trial Cal.—Knox, *D.J.***
Nov.	**29**	**Filed Interrogs. propounded to Respondents**
1947		
Jan.	**7**	**Pre-Trial Hearing—Marked—T. C. Knox, *J.***

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Docket Entries

4	Oct.	6	Pre-Trial before Knox, *J*. Marked—T. C.—Must be tried when reached.
	Oct.	27	Filed Answers to Interrogs.
	Oct.	29	Trial Begun before Medina, *J*.
	Oct.	30	Trial Continued & Concluded Decision Reserved
	Dec.	8	Filed opinion #17223 Medina *J*.—(See Opinion)
	Dec.	24	Filed Stenographer's minutes
	1948		
5	Mar.	5	Filed Opinion #17353 Re maintenance etc. Motion Denied. Medina *J*.
	"	"	Filed Notice of Motion for rehearing Memo End Motion Denied etc. Medina *J*.
	Apr.	30	Filed Findings of Fact and Conclusions of Law. Medina, *J*.
	May	3	Filed final decree ($644.16 and $36. costs) against American South African Line and dismissing libel as against U. S. A. Medina, *J*.
	May	3	Filed notice and allowance of appeal (Hulbert, *J*.) by American South African Line.
6	MAY 6		Filed Appellant's Assignments of Co
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Libel and Complaint of Walter K. Warren

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

IN ADMIRALTY

The libel and complaint of Walter K. Warren against the United States of America, as owner of the Steamship "ANNA HOWARD SHAW", and American South African Line, Inc., as operator of the Steamship "ANNA HOWARD SHAW", in a cause of action for wages, overtime and maintenance, civil and maritime, respectfully shows upon information and belief, as follows:

Action Under Special Rule for Seamen to Sue Without Security or Prepayment of Fees for the Enforcement of the Laws of the United States, Common and Statutory, for the Protection and the Health and Safety of Seamen at Sea.

First: That the respondent, the United States of America, was and still is a corporation sovereign, which has by law consented to be sued herein.

Second: That notice of claim, pursuant to Public Law 17, was duly served by the Libellant upon the American South African Line, Inc., General Agent of the vessel, and upon the United States Attorney, for the War Shipping Administration, on the 22nd day of December, 1944, and before the commencement of this action.

Third: That more than sixty (60) days have elapsed
10 since such claim, on which this action is founded, was presented to the American South African Line, Inc., General Agent of the vessel, and the War Shipping Administration, for adjustment, and that they have neglected and refused to make an adjustment or payment therefore for sixty (60) days after such presentment.

Fourth: That at all the times hereinafter mentioned the respondent, the United States of America, owned, managed and controlled a certain merchant vessel known as the S.S. "ANNA HOWARD SHAW".

11

Fifth: That the American South African Line, Inc. is a foreign corporation with an office and place of business in the Borough of Manhattan, City and State of New York.

Sixth: That at all the times hereinafter mentioned, the respondent, American South African Line, Inc., operated, managed and controlled a certain vessel known as the S.S. "ANNA HOWARD SHAW".

Seventh: That the S.S. "ANNA HOWARD SHAW" is now, or during the pendency of this action will be in the Port
12 of New York and within the territory and jurisdiction of the United States of America.

Eighth: That at all the times hereinafter mentioned, libellant was employed by the respondents aboard the aforesaid steamship in the capacity of Messman, at the rate of base wages of $87.50 per month, plus overtime and bonus.

Ninth: That on or about the 30th day of October, 1944, while the S.S. "ANNA HOWARD SHAW" was lying at

anchor, north of Naples, libellant was given shore leave and proceeded to a balcony of a dance hall to obtain a view of the panorama. That while standing out on the balcony he was caused to fall a distance of approximately fifty (50) feet when the railing on the balcony collapsed, whereby he sustained a fracture of the distal end of the right tibia and fibula.

Tenth: That he was then removed to the 118th Evacuation Hospital at Naples where he was a patient until November 17th, 1944 when he was eventually returned to New York on December 8th, 1944 and was caused to enter the U. S. Marine Hospital at Stapleton.

Eleventh: That by reason of the injuries so received, while in the service of the said vessel as above stated, the libellant has been incapacitated and will continue to be so incapacitated for a long period of time and by reason thereof has been put to great expense and claims to be entitled to the wages he would have earned had he been permitted to conclude the voyage aboard the S.S. "ANNA HOWARD SHAW", his transportation from Miami, Florida to New York, his repatriation bonus, his overtime and his reasonable support since his said injury until he shall be cured, in the amount of Fifteen thousand and no/100 ($15,000.00) Dollars.

Twelfth: That all and singular, the foregoing allegations are true, and within the Admiralty Jurisdiction of this Honorable Court.

WHEREFORE, libellant prays that process in due form of law, according to the course of this Honorable Court in

Admiralty cases, may issue against the said respondents and
16 that this Honorable Court may be pleased to decree the payment of libellant's claim in the sum of Fifteen thousand and no/100 ($15,000.00) Dollars, together with the costs and disbursements of this action.

SAUL SPERLING
Proctor for Libellant
Office & P. O. Address
61 Whitehall Street
Borough of Manhattan
City of New York—4

17

(Duly verified February 20, 1945)

18

Answer of the Respondent, United States of America, to the Libel of Walter K. Warren

19

To the Honorable the Judges of the United States District Court for the Southern District of New York

The answer of the respondent, United States of America, to the libel of Walter K. Warren, in an alleged cause of action, civil and maritime, alleges on information and belief, as follows:

First: It admits that at all the times mentioned in the libel, the respondent, United States of America, was and still is a sovereign which has by law consented to be sued in accordance with the provisions contained in the law giving such consent and not otherwise. It denies all the other matters contained in Article numbered First of the libel.

20

Second: It admits that a paper, purporting to be a notice of claim pursuant to Public Law 17, was served by the libelant upon the American South African Line, Inc., and upon the United States Attorney for the United States of America, on the 22nd day of December, 1944, and before the commencement of this action. It denies all the other matters contained in Article numbered Second of the libel.

21

Third: It admits that more than sixty days have elapsed since the presentation to the American South African Line, Inc., and this respondent, of the paper described in Article numbered Second hereof, and that they have refused to

make an adjustment or payment of any amount demanded therein. It denies all the other matters contained in Article numbered Third of the libel.

Fourth: It admits the matters contained in Article numbered Fourth of the libel.

Fifth: It admits that the American South African Line, Inc. is a domestic corporation with an office and place of business in the Borough of Manhattan, City and State of New York. It denies all the other matters contained in Article numbered Fifth of the libel.

Sixth: It denies all the matters contained in Article numbered Sixth of the libel.

Seventh: It denies that it has any knowledge or information thereof, sufficient to form a belief, as to whether the SS ANNA HOWARD SHAW, during the pendency of this action, will be in the port of New York, and within the territory and jurisdiction of the United States of America. It denies all the other matters contained in Article numbered Seventh of the libel.

Eighth: It admits that on the 30th day of October, 1944, the libelant was employed by the United States of America aboard the SS ANNA HOWARD SHAW, in the capacity of messman, at the rate of base wages of $87.50 per month, plus overtime and bonus. It denies all the other matters contained in Article numbered Eighth of the libel.

Answer of the Respondent, United States of America, to the Libel of Walter K. Warren

Ninth: It admits that on or about the 30th day of October, 1944, the SS ANNA HOWARD SHAW was lying at anchor, north of Naples. It denies that it has any knowledge or information thereof, sufficient to form a belief, as to all the other matters contained in Article numbered Ninth of the libel.

Tenth: It denies that it has any knowledge or information thereof, sufficient to form a belief, as to all the matters contained in Article numbered Tenth of the libel.

Eleventh: It denies all the matters contained in Article numbered Eleventh of the libel.

Twelfth: It denies all the matters contained in Article numbered Twelfth of the libel.

As a First Complete Defense to the Libel

Thirteenth: That, if the libelant received any injuries as alleged in the libel, said injuries were caused in whole or in part by libelant's own gross negligence and/or by his own deliberate act of indiscretion.

As a Second Complete Defense to the Libel

Fourteenth: That libelant failed to comply with the provisions of Public Law 17—78th Cong. and H. R. 133, providing that a claim be filed before the institution of action

28 and that no action be instituted until the claim has been administratively disallowed.

As a Third Complete Defense to the Libel

Fifteenth: That the cause of action set forth is not within the jurisdiction of this Honorable Court in that at the time of the filing of the libel herein, the SS ANNA HOWARD SHAW was not within the United States, and the respondent, United States of America, asserts its immunity from suit on account of the matters alleged in the
29 libel.

As a Fourth Complete Defense to the Libel

Sixteenth: That at the time of the filing of the libel herein, the SS ANNA HOWARD SHAW was not within the jurisdiction of the Southern District of New York.

Seventeenth: That it has no knowledge or information thereof, sufficient to form a belief, as to whether or not the libelant was a resident of the Southern District of New York at the time of the filing of the libel herein and it leaves
30 the libelant to its proof thereof. If libelant, at the time of the filing of this libel, was not a resident of the Southern District of New York, respondent objects to being sued in the Southern District of New York.

WHEREFORE, respondent demands that the libel be dismissed with costs the respondent as against the libelant and

that the Court grant to the respondent such other, further and different relief as the justice of the cause may require. 31

JOHN F. X. MCGOHEY
United States Attorney

KIRLIN CAMPBELL HICKOX & KEATING
of counsel
Proctors for Respondent,
United States of America
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120 Broadway 32
Borough of Manhattan
New York 5, N. Y.

(Duly verified April 25, 1945)

33

Answer of the Respondent, American South African Line, Inc., to the Libel of Walter K. Warren

34 TO THE HONORABLE THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

The answer of the respondent, American South African Line, Inc., to the libel of Walter K. Warren, in an alleged cause of action, civil and maritime, alleges on information and belief, as follows:

First: It admits that at all the times mentioned in the
35 libel, the respondent, United States of America, was and still is a sovereign which has by law consented to be sued in accordance with the provisions contained in the law giving such consent and not otherwise. It denies all the other matters contained in Article numbered First of the libel.

Second: It admits that a paper, purporting to be a notice of claim pursuant to Public Law 17, was served by the libelant upon the American South African Line, Inc. on the 22nd day of December, 1944, and before the commencement of this action. It denies that it has any knowledge or infor-
36 mation thereof, sufficient to form a belief, as to all the matters contained in Article numbered Second of the libel alleged with respect to the United States of America and the War Shipping Administration. It denies all the other matters contained in Article numbered Second of the libel.

Third: It admits that more than sixty days have elapsed since the presentation, to this respondent, of the paper described in Article Second hereof, and that it has refused

to make an adjustment or payment of any amount demanded therein. It denies that it has any knowledge or information thereof, sufficient to form a belief, as to all the matters contained in Article numbered Third of the libel made with respect to the United States of America and the War Shipping Administration. It denies all the other matters contained in Article numbered Third of the libel. 37

Fourth: It admits the matters contained in Article numbered Fourth of the libel.

Fifth: It admits that it is a domestic corporation with an office and place of business in the Borough of Manhattan, City and State of New York. It denies all the other matters contained in Article numbered Fifth of the libel. 38

Sixth: It denies all the matters contained in Article numbered Sixth of the libel.

Seventh: It denies that it has any knowledge or information thereof, sufficient to form a belief, as to whether the SS ANNA HOWARD SHAW, during the pendency of this action, will be in the port of New York and within the territory and jurisdiction of the United States of America. It denies all the other matters contained in Article numbered Seventh of the libel. 39

Eighth: It admits that on the 30th day of October 1944, the libelant was employed by the United States of America, aboard the SS ANNA HOWARD SHAW in the capacity of messman at the rate of base wages of $87.50 per month, plus

40 overtime and bonus. It denies that at the time of the accident alleged in the libel, libelant was in the service of the SS ANNA HOWARD SHAW, the United States of America or this respondent. It denies all the other matters contained in Article numbered Eighth of the libel.

Ninth: It admits that on or about the 30th day of October, 1944 the SS ANNA HOWARD SHAW was lying at anchor, north of Naples. It denies that it has any knowledge or information thereof, sufficient to form a belief, as to all the other matters contained in Article numbered
41 Ninth of the libel.

Tenth: It denies that it has any knowledge or information thereof, sufficient to form a belief, as to all the matters contained in Article numbered Tenth of the libel.

Eleventh: It denies all the matters contained in Article numbered Eleventh of the libel.

Twelfth: It denies all the matters contained in Article numbered Twelfth of the libel.

42 *As a First Complete Defense to the Libel*

Thirteenth: That, if the libelant sustained any injuries as alleged in the libel, said injuries were caused in whole or in part by libelant's own gross negligence and/or by his own deliberate act of indiscretion.

Answer of the Respondent, American South African Line, Inc., to the Libel of Walter K. Warren

43

As a Second Complete Defense to the Libel

Fourteenth: That libelant failed to comply with the provisions of Public Law 17—78th Cong. and H. R. 133, providing that a claim be filed before the institution of action and that no action be instituted until the claim has been administratively disallowed.

KIRLIN CAMPBELL HICKOX & KEATING
Proctors for Respondent,
American South African Line, Inc. 44
Office & P. O. Address:
120 Broadway
New York, N. Y.

(Duly verified April 9, 1945)

45

Interrogatories Propounded to Libelant to be Answered by Him in Writing and Under Oath

46 UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Ad. 135-171

[SAME TITLE]

First: State where was the SS ANNA HOWARD SHAW anchored at the time you claim to have been injured, by giving (a) the port, (b) the ship's location in the port, and
47 (c) the pier, giving its name, number and exact location.

Second: State (a) who gave you shore leave, (b) when, and (c) when were you required to return to the vessel.

Third: Give the date, hour and minute when you last left the SS ANNA HOWARD SHAW prior to the time you claim you were injured.

Fourth: (a) Were you accompanied by anyone when you left the vessel at the time mentioned in the foregoing interrogatory? If so, (b) give the name or identify the individ-
48 ual or individuals.

Fifth: Did you go ashore purely for pleasure?

Sixth: If your answer to the foregoing interrogatory is in the negative, (a) state for what purpose you went ashore. If you claim that you went ashore on ship's business, state (b) what business of the ship were you ashore on, (c) name

and/or otherwise identify the person who ordered you to go ashore on the said business, (d) when and where was this order given, and (e) give the names, addresses and the nature of the businesses of all persons, firms and corporations with whom the said business was transacted or was ordered to be transacted. 49

Seventh: What was your immediate destination at the time you left the vessel?

Eighth: (a) Did you go directly to the dance hall after you left the vessel? If you did, (b) trace the route you took on your way to the dance hall. 50

Ninth: (a) State as nearly as possible the distance from the place where the vessel was anchored to the dance hall where you claim you sustained your injuries. If the vessel was not anchored at a pier or dock, (b) state as nearly as possible the distance from the dance hall to the pier or dock which you traversed when you came ashore.

Tenth: (a) Do you claim that your alleged injuries were sustained in a place which you had to traverse in going from or returning to your vessel? 51

Eleventh: Were your alleged injuries sustained in a place beyond the place which you had to traverse in going from or returning to the vessel?

Twelfth: Do you claim that at the time of your alleged accident you were (a) going from or (b) returning to the vessel?

Interrogatories Propounded to Libelant to be Answered by Him in Writing and Under Oath

52 Thirteenth: If you claim that at the time of your alleged accident you were either going from or returning to the vessel, state what acts, whether mental or physical, constitute the basis for this assertion.

Fourteenth: Were you sober at the time you claim to have sustained your injuries?

Fifteenth: (a) Did you drink any alcoholic beverages during the time after you left the vessel and prior to your alleged accident? If so, (b) state what alcoholic beverages
53 you drank, (c) the quantity of each which you consumed, and (d) the place or places where you consumed these beverages.

Sixteenth: (a) State how long you had been in the dance hall before your alleged accident? (b) What did you do while there?

Seventeenth: (a) Did you go out on the balcony alone, or were you accompanied by anyone? If you were accompanied by someone, (b) name and/or otherwise identify the said individual or individuals.

54 Eighteenth: State what you were doing at the time you claim to have been injured.

Nineteenth: (a) Did you notice whether the balcony or any part of it was unsafe or defective? If so, (b) state in what respect and particular. If not, (c) state whether you made any examination or inspection to determine whether it was safe.

Interrogatories Propounded to Libelant to be Answered by Him in Writing and Under Oath

Twentieth: (a) Did anyone request you to go out on the balcony? If so, (b) identify that individual or individuals. 55

Twenty-first: State specifically what you did while you were on the balcony.

Twenty-second: Were you pushed or shoved by anyone at the time you claim you fell?

Twenty-third: If there were other persons on the balcony at the time you claim it collapsed, identify those individuals and state what they were doing. 56

Twenty-fourth: Identify with particularity sufficient for identification the dance hall where you claim to have sustained your accident, by giving its name, the name of the city, and the name of the street.

Twenty-fifth: Give a statement of each and every injury which you claim you sustained in the aforementioned accident, giving the name, location, extent and duration of each injury, and which, if any, you claim to be permanent.

Twenty-sixth: State how long on account of the injuries, for which you assert this respondent responsible, you were (a) confined to the hospital; (b) confined to your bed; (c) confined to your home; (d) unable to work. 57

Twenty-seventh: State the amount of money you claim you have expended for medical attention and medicines on account of the injuries for which you claim this respondent is responsible, and to what extent you have become indebted for these items, if at all.

Interrogatories Propounded to Libelant to be Answered by Him in Writing and Under Oath

58 Twenty-eighth: State the name and/or location of each and every hospital at which you claim to have received treatment, giving the dates during which this treatment was obtained, and indicate which of these treatments were inpatient and which were outpatient.

Twenty-ninth: State the amount of money you claim you have lost which you otherwise would have earned because of the injuries for which you claim this respondent is responsible.

59 Thirtieth: (a) State the date of commencement and the date of termination of the period or periods for which you claim you are entitled to maintenance and cure. (b) State the amount of money to which you claim you are entitled for maintenance and cure.

Thirty-first: State your permanent residence, giving the street, house number, town, village or city and state (country).

Thirty-second: State the country of which you were a citizen at the time of the commencement of this action and
60 state whether by nativity or naturalization, and if the latter, state where and when you were naturalized.

Dated, New York, July 25, 1945.

KIRLIN CAMPBELL HICKOX & KEATING
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120 Broadway
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New York 5, N. Y.

Libelant Answers the Interrogatories Propounded by Respondents

61

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Ad. 135-171

[SAME TITLE]

Libellant answers the interrogatories propounded by respondents as follows:

62

First: (a) & (b) S.S. Anna Howard Shaw was anchored at Magnolia, Italy, approximately seven miles north of Naples.

Second: (a) Captain Norman White. (b) At 12 Noon on October 30, 1944. (c) Midnight, same day.

Third: October 30, 1944, at about 13 o'clock.

Fourth: (a) Approximately ten members of the crew were in the same lifeboat. (b) Among whom were the ship's carpenter and messman.

63

Fifth:

&

Sixth: Libellant was given shore leave for relaxation by the captain and accordingly went sightseeing.

Seventh: Shore.

Libelant Answers the Interrogatories Propounded by Respondents

64 Eighth: (a) No.

Ninth: About a mile from where libellant went ashore.

Tenth: Yes.

Eleventh: No.

Twelfth: (b) Returning to the vessel.

Thirteenth: Had to leave the balcony in order to return to the vessel.

65

Fourteenth: Yes.

Fifteenth: (a) No.

Sixteenth: (a) One and one-half hours. (b) Danced and dined.

Seventeenth: (a) Yes.

Eighteenth: Watching the seas splashing over the breakwater.

66

Nineteenth: (a) No. (c) No.

Twentieth: (a) No.

Twenty-first: Enjoying one of the most beautiful scenes in the entire world.

Twenty-second: No.

Libelant Answers the Interrogatories Propounded by Respondents

Twenty-third: He believes there were other persons but did not take particular notice what they were doing. 67

Twenty-fourth: The dance hall was located on top of a small hill on a waterfront street that ran almost straight south along the waterfront in Magnolia, Italy, about a mile from where libellant went ashore.

Twenty-fifth: A fracture of the distal end of the right tibia and fibula resulting in an osteomyelitis which required the performing of an open reduction. Believes that condition of enlarged stiff ankle will be permanent. 68

Twenty-sixth: Was confined to hospital from October 30, 1944 to December 21, 1944, and from February 27, 1945 to May 29, 1945. (d) Was unable to work from October 30, 1944 to July 1, 1945, when he first was permitted to take a light job.

Twenty-seventh: Approximately $100.00.

Twenty-eighth: Was confined to the 118 Station Hospital at Naples, Italy from October 30, 1944 to November 17, 1944, when he was transferred by airplane to the 56th Station Hospital at Casablanca where he was confined to November 30, 1944, when he was transferred to Stapleton, Staten Island, where he was confined until December 21, 1944, and was admitted to the U. S. Marine Hospital at Detroit, Michigan on February 27, 1945, where he remained until May 29, 1945. 69

Libelant Answers the Interrogatories Propounded by Respondents

70 Twenty-ninth: Eight months wages, approximately Two Thousand Dollars; Five Hundred Dollars for miscellaneous and travelling expenses.

Thirtieth: Claims maintenance from November 30, 1944 to December 8, 1944; from December 21, 1944 to February 27, 1945, and from May 29th to July 1, 1945, at the rate of Four Dollars per day, reserving right to claim for future maintenance in the event leg disables him from doing any work.

71 Thirty-first: #528 South Grand Avenue, Lansing, Michigan.

Thirty-second: Native born American.

SAUL SPERLING
Proctor for Libellant
Office and P. O. Address
61 Whitehall Street
Borough of Manhattan
New York 4, New York

72 (Duly verified)

Interrogatories Propounded to Respondents, to be Answered by Them in Writing and Under Oath

UNITED STATES DISTRICT COURT 73

SOUTHERN DISTRICT OF NEW YORK

A. 135-171

[SAME TITLE]

First: State where the SS "Anna Howard Shaw" was on March 5, 1945.

74

Second: Give the names of each port at which the SS "Anna Howard Shaw" was docked, the date of arrival and the date of departure therefrom since March 5, 1945.

Third: State on what date the voyage of the SS "Anna Howard Shaw", which commenced on or about May 28, 1944, came to an end.

Fourth: State what amount was paid by way of bonus to the members of the crew of the SS "Anna Howard Shaw" for the voyage which began on or about May 28, 1944.

75

Fifth: State what entry was made in the official deck log of the SS "Anna Howard Shaw" concerning the injuries of libellant on or about October 30, 1944.

Sixth: State whether or not any report was made by the Master or any other officer of the SS "Anna Howard Shaw" to the respondents or either of them, concerning libellant's injuries and hospitalization, if so, set forth a complete copy thereof.

Interrogatories Propounded to Respondents, to be Answered by Them in Writing and Under Oath

76 Seventh: State whether respondents or either of them have received or have in their possession any report concerning the hospitalization of and treatment rendered to libellant at the 118th Evacuation Hospital, at Naples, if so, set forth a true and complete copy thereof.

Eighth: State fully what acts or omission on the part of the libellant, respondent claim constituted libellant's own gross negligence.

Ninth: Describe fully each and every act which respon-
77 dents claim was libellant's own deliberate act of indiscretion.

Tenth: State the respects in which the respondents claim libellant failed to comply with the provisionsof Public Law 17—78th Congress, H. R. 133, and the regulations thereunder.

Dated: November 19th, 1946.

SAUL SPERLING
Proctor for Libellant
Office and P. O. Address:
61 Whitehall Street
78 New York City.

Respondents Answering the Interrogatories Propounded by Libelant

UNITED STATES DISTRICT COURT 79

SOUTHERN DISTRICT OF NEW YORK

Ad. 135-171

[SAME TITLE]

Respondents answering the interrogatories propounded by libellant allege upon information and belief as follows:

1. At sea, bound for Capetown, Africa. 80

2. SS ANNA HOWARD SHAW docked at the following American ports between March 5th, 1946 to November 19th, 1946.

New York, June 4, 1945
Philadelphia, January 7th, 1946
New York, February 3rd, 1946
Boston, February 4th
New Orleans, April 28th, 1946
New Orleans, April 3rd, 1946 81

3. The crew was paid off at New York on or about December 23rd, 1944.

4. Following are the bonuses paid one, James Griggs, also a messman for the same voyage.

100% bonus—2 months, 2 days—	$206.67
66 2/3% " —4 months, 10 days—	346.67
Area bonus —65 days at $5.00—	325.00

Respondents Answering the Interrogatories Propounded by Libelant

82 5. Following is the entry contained in the official log regarding libellant's alleged accident.

"October 30, 1944, Naples, Italy.

Walter K. Warren, messman, on this date injured himself in fall, sent to 118th Station Hospital, Naples, Italy for treatment. Fell off a cliff while on shore. He stated that he had a drink. Ralph R. Albert, carpenter and James M. Barr messman stated Warren was sober. Injury apparently accidental.

83

/s P. Orne N. White
Ch. Mate, Master."

On November 16th, 1944 at Naples, Italy, further statement is made with regard to libelant's injuries.

"Naples, Italy, November 16, 1944.

On October 30, 1944 Walter K. Warren, messman Z482851 was signed off the articles by American Consul, Naples, Italy, Walter Warren being at the time confined in No. 118 Army Base Hospital with injuries sustained as per previous entry. All of Walter Warren's papers and personal effects were delivered to him and acknowledged.

84

P. Orne N. White
Ch. Mate, Master."

6. The only information presently in respondents' possession regarding libelant's injuries and hospitalization is as follows:

Respondents Answering the Interrogatories Propounded by Libelant

"Fracture simple complete tibia right, distal end and fibula right end 1/3." 85

7. The respondents' present information as to libelant's hospital treatment at the 118th Evacuation hospital at Naples is above set forth in answer to interrogatory 6th.

8 and 9. Respondents are unable at this time to state fully the acts and omissions of libelant constituting gross negligence and deliberate acts of indiscretion. The libelant's alleged accident took place at a distance from the vessel and at a place where he was not under the surveillance of 86
respondents. Respondents did not shadow libelant while he was ashore and consequently are not able to state any of his acts which led up to his alleged accident and indeed have no direct information as to the manner in which libelant received any injuries. Respondents reserve the right to introduce on the trial through libelant himself the quality and character of his activities while he was away from the vessel as support, in part, for the defenses of gross negligence and deliberate acts of indiscretion.

10. Libelant failed to comply with the provisions of Public Law 17, 78th Congress, H. R. 133 and the regulations 87
thereunder in that the claim failed to disclose all of the facts and circumstances leading up to and surrounding the happenings of the event out of which it is alleged this claim arose.

Respondents Answering the Interrogatories Propounded by Libelant

88 Dated, New York, October 24, 1947.

JOHN F. X. MCGOHEY,
United States Attorney
Proctor for Respondent,
United States of America

By KIRLIN CAMPBELL HICKOX & KEATING
Of counsel to said respondent, and
Proctors for Respondent,
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To:

SAUL SPERLING, Esq.
Proctor for Respondent
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New York, New York

90

Testimony

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

A. 135-171

[SAME TITLE]

Before:

HON. HAROLD R. MEDINA,

District Judge.

New York, October 29, 1947;
10.30 o'clock a. m.

APPEARANCES:

SAUL SPERLING, ESQ., *Proctor for Libelant*;
X. N. Sardaro, Esq., of Counsel.

JOHN F. X. MCGOHEY, ESQ., *United States Attorney*,

and

KIRLIN, CAMPBELL, HICKOX & KEATING, ESQRS., *Proctors for Respondents*;
Walter X. Connor, Esq., of Counsel.

(Discussion.)

WALTER K. WARREN, the libelant, called as a witness in
94 his own behalf, being duly sworn, testified as follows:

Direct Examination by Mr. Sardaro:

Q. Mr. Warren, will you please tell us when and where you were born. A. August the 2nd, 1910, Portland, Indiana.

Q. Have you been going to sea for any time? A. Prior to the war?

Q. Well, when did you start going to sea? A. In 1944, about May 1944, approximately, the first trip at sea.

95 Q. In October of 1944 what ship were you on? A. The Anna Howard Shaw.

Q. When did you sign articles on that ship? A. Around the 28th of May, 1944, or the 1st of June, somewhere close to that.

Q. You joined the Anna Howard Shaw about June 1, 1944? A. That is correct.

Q. In what capacity did you join it? A. As a messman in the stewards' department.

Q. And what rate of wages were you getting for that job? A. $87.50 per month, I believe.

Q. Was this only the second ship that you had served on?
96 A. Yes, that is true. I was on a couple of other ships for a short duration—a day or two.

Q. Did you make any trips to Europe on other ships? A. No.

Q. In other words, this was your first trip to Europe? A. That was my first trip overseas or across the sea.

Q. On October 30, 1944, where was the Anna Howard Shaw? A. She was in port, a small distance north of

Naples, Italy. I guess the name of the port was Magnolia or something of that sort—probably six or seven miles north of Naples. There was electric service road to Naples. 97

Q. Do you recall what date you arrived there? A. We arrived there the day before, which would have been the 29th of October.

Q. Did you go ashore on the 29th? A. No.

Q. Did you go ashore on the 30th of October? A. Yes.

Q. And before going ashore did you get any pass? A. Yes, the captain issued passes for the crew.

Q. Tell us the circumstances under which you got this pass. A. Well, as I recall the steward came in and said that the captain would issue passes at noon for the fellows to go ashore, but half of them would have to remain and the other half of them would go at once and they would draw cuts to see which ones went first. 98

Q. And you drew one of the first, is that right? A. That is correct.

Q. And about what time of the day did you go ashore? A. Well, possibly the passes were issued at 12 o'clock but the lifeboats had to be gotten ready and a few little minor details taken care of. It must have been one or maybe even 1.30 by the time we got to shore.

Q. How did you get from the ship to shore? A. We used a motor lifeboat off from the ship. 99

Q. And who lowered that boat? A. The deck crew, as I recall it. A deck cadet was operating the engine on the ship. It was a small motor.

Q. And how far offshore was the ship? A. Oh, judging distance by the water, it is always a little bit out of my line but it was at least a half a mile and maybe a mile.

Q. And who else was in the boat with you, if you recall?
100 A. Well, there was quite a boatload. There was three of the boys operating the lifeboat, and the water was quite rough and they had to have canvas up over them, and they probably put up about eight or nine members of the crew in the ship—in the lifeboat, and as I recall it we all got wet. We had to keep straight into the waves, the spray—

Q. About nine fellows going on shore leave at the same time? A. Well, probably nine or ten. I wouldn't say exact on that count.

Q. And after you got ashore did you all go together or did you separate? A. No, there was three of us by the
101 same coincidence started off to the right together, and it happened to be the ship's carpenter and another messman and I, and we just walking from here to there, sightseeing, not caring anything about where we were going or paying any attention.

Q. You mean you walked along the road? A. Well, it was—if it was streets they were going in all directions. As I recall, we followed the shoreline to the south.

Q. And did you go into any place in the course of your travels? A. Yes. We was in two and we saw many places, little merchants selling clothing, and curious and one thing
102 and another, just sightseeing more than anything else.

Q. Well, you were injured when you were ashore that day, were you not? A. That is correct.

Q. What place did you go into that you were injured at? A. Pardon?

Q. Where were you injured? A. In—well, you might say it was a dance hall but I would compare it to our U. S. O. clubs, is what I would actually compare it to. It

was just a place, a makeshift place, a pretty fair building but a makeshift place that entertained for soldiers and one thing or another. 103

Q. What attracted you to it? A. Well, we heard music and saw people going in and out, a little activity going on.

Q. And you walked in? A. That is correct.

Q. When you got in there did they have tables and chairs? A. Well, as I recall they were—the front room was empty and the room to the right where they danced was a little orchestra in the corner and most of it was—the space was used for dancing but there was two or three tables along the back side of it which would have been the south side along the wall, and I doubt if they— maybe 104 just light lunches and a little beer—not beer but wine. They were serving there and I do not even know whether it was intended for this or it was a place where it was just a kind of an entertainment place with just a little sideline if you wished.

Q. Did you sit at a table? A. I did, for a few minutes, but I was dancing most of the time.

Q. With your fellow crew members? A. Yes. There was a couple of the others there, Mr. Barr and the carpenter.

Q. And who else was sitting at the table? A. Two or three Italian people. 105

Q. And how long did you stay at this dance hall, the U.S.O.—the place of entertainment, before you were hurt?

Mr. Connor: Did you withdraw that statement about the "U. S. O.", Mr. Sardaro?

Mr. Sardaro: All right, I will withdraw that.

Q. How long were you there before you were hurt? A. Why, perhaps an hour to an hour and a half.

Q. And during that time what did you do? A. Danced
106 most of the time. I sat down a little bit between dances.

Q. Did you have any refreshments of any kind? A. As I recall, we drank one glass of wine apiece.

Q. About how large a glass? A. Oh, probably two to three ounces, maybe a four-ounce glass—not over a four-ounce glass.

Q. And that is all you had to drink? A. That is all that I had to drink in the dance hall.

Q. Well, did you have anything to drink before you got there? A. Yes. We stopped at a little place, oh, probably an hour before we got there, about half-way up the beach.
107 The beach was quite irregular and we walked probably twice or three times the distance following the beachline that it would be actually as a straight line, and we stopped about half-way in a little place for curiosity, I guess, more than anything else, and the boys said, "Let us see what kind of wine they have or what their wine looks like."

They had never been ashore in Italy either, and they said, "Well, we will buy a little bottle of wine." That is the way they sell it, you know.

Q. Was the bottle of wine bought? A. As I recall it, the reason it is so fresh in my mind, I remember the Italian
108 gentleman picking up the bottle, looking in it and shaking it and blowing dust out of it, wiping the cobwebs off, and then he poured a little water on it and rinsed it out and then took it over to a barrel and opened the spigot and filled it with wine. It was quite amusing.

Q. How big was the bottle? A. Well, perhaps comparable to the size of one of our standard beer bottles, maybe 12 ounces. Isn't that what they are?

Q. Well, about; and the three of you drank that wine? A. The three of us drank that wine. I recall they—cutting two bottles for glasses and the edges were sharp and they were quite dirty—that is why I remember it. 109

Q. Did you divide it evenly? A. We divided it evenly. I do not know whether we drank the whole bottle. I know we kind of turned up our noses slightly at it.

Q. About how much did you drink? A. Oh, possibly not over four ounces at the very most.

Q. And did you have anything else to drink after you left the ship? A. Not that I recall. In fact I know I did not, unless it was water, and I don't even recall taking a drink of water anywhere. 110

Q. So that up to the time of your accident you had consumed roughly between 7 and 8 ounces of wine? A. That would probably be a large estimate.

Q. Now what time was it that you were injured? A. Oh, I imagine 4—between 4 and 4:30. That would be 1300 to 1350 by the ship's time.

Q. 1300 would be one o'clock, would it not? A. Oh yes—I am wrong on that.

The Court: Don't worry about the exact calculations. It was between 4 and 4:30 in the afternoon? 111

The Witness: That is correct.

Q. Please tell us how you happened to be injured. A. Well, I am quite a person to enjoy nature and scenery myself, and I heard this breakwater hitting up on the rock, and spraying, and I walked around in the other room with French doors, say comparable to these panels here (indicating), if they would open to the ceiling, and they were

open and the sun was shining in from out over the sea
112 and the building was built up quite high; they were a story below, and then there was a bunch of stone piled up, probably out about 30 or 40 feet from the foundation for the sea water to hit, to protect the foundation of the building, perhaps—that is my calculation of what the stone was piled there for—and as the water would spray over the side and hit the wall it would run down and the edge of the wall was quite smooth at the bottom, and presumably—perhaps high seas were hitting and flying over the breakwater and the water running back down.

Q. Well, what happened? You walked out of this win-
113 dow? A. It was not really a balcony—I would hardly describe it as that. It was opened up and here (indicating) it was clear to the floor, like big windows, and there were posts on each side of it.

Q. How wide was it from the wall of the building, extending out from the wall? A. Well, I don't recall that exactly. I think it was probably 3 feet from where the windows of the doors opened out to the edge.

Q. And was there a rail around? A. There was no rail, protected railing. It was just a straight platform but there was an iron rod running up the side of the post, which
114 would be comparable maybe to our lightning arrester or something of that type, and I walked out there and stood and watched a little bit with my hand on the post, and it was a masonry post, and I looked over a little bit and somehow or other I took a hold of this rod which was going up along the side, probably a half-inch metal rod, and as I took a hold of it and kind of looked out a little bit to see it let loose unexpectedly, which was quite a surprise, you know, and I did not have time to recover myself, so I

held on to it and I went straight down until I came to the lower floor, and there was a railing and a porch, a metal railing stuck out, and I hit on that and turned over once and then slid straight down the lower wall, which was smooth, and made of rock or masonry, and it would not have hurt me if I hadn't slid down that with quite a force and my foot run into this pile of rock, my right foot. 115

Q. Just before the accident had you been feeling all right? A. Why, I was feeling all right. So far as I know I have never been sick.

Q. Were you feeling all right at the time? A. I was.

Q. Did the wine affect you in any way? A. No. 116

Mr. Connor: I object to that, if your Honor pleases. We are getting into something that looks like leading. He was talking about his health but I see now it is another matter that he is talking about.

The Court: I will allow it. I will overrule your objection.

Q. Were you affected in any way by this wine you had been drinking in the afternoon? A. I was not. I would never have known I drank it if I hadn't recalled it afterward. 117

Q. You fell down this place. About how far did you fall, by the way? A. Well, it was probably 15 feet, 12 to—probably 10 to 12 feet to the first railing and then probably 15 feet, oh, probably, or 18, but of course when I went down over this first railing I struck it with my right leg. It turned me over and broke the fall.

Q. After this injury what happened to you? A. Well,
118 the boys—I was kind of a little bit dazed at first and I had this piece of rod in my hand and I remember holding it up and looking at it, and, gee, I wondered how I got all the way down there without wrapping it around my neck or something, and I didn't get up right away, and then Mr. Barr got there and he said, "Are you hurt?"

I said, "Yes, my leg is numb—my right leg is broken", and I said, "I can get up anyway", and he said, "No, don't. The boys are coming with a stretcher."

There happened to be an Army jeep out there with a couple of Army boys in it, probably MPs or something of
119 that type on patrol, so I would have gotten up and tried to walk.

Q. Well, were you taken to a hospital? A. Yes, I was.

Q. The 118th Station Hospital in Naples, the hospital in Naples? A. The evacuation hospital in Naples.

Q. And how long did you stay there? A. I was there from October 30th to November 17th, I believe.

Q. And from the 118th Station Hospital where were you taken? A. Well, we were loaded in a plane, a C-47 Army Transport Command plane at an airport in Naples and flown to Casablanca, North Africa.

120

The Court: That is on November 17th?

The Witness: That was on November 17th.

A. (Continuing) We possibly reached there on midnight or after it. Well, I guess it was before midnight on the 17th that we reached Casablanca.

Q. And how long did you stay at Casablanca? A. Well, the weather got bad and we couldn't get the planes out.

There was a storm between there and the Azores, and they held us there until I believe it was the 28th of the month 121
before they loaded us on a—

Q. You did not get there until the 30th—I beg your pardon, you stayed there until about the 28th? A. It was —anyway, the time elapsed between flying us direct from there. We arrived in Miami, Florida, about ten o'clock at night on December 1st, so the course was probably about 32 hours flying time, or something like that.

Q. In other words, from Casablanca you waited there until weather conditions cleared? A. That is right.

Q. And then you came by plane to Miami? A. That is 122
right.

Q. Did you have to pay for your food or lodging between October 30th and November 30th or December 1st? A. October 30th?

The Court: From the time you got hurt up until the time you arrived—where was it, Miami Beach or Miami?

The Witness: Miami Airport.

The Court: Miami Airport?

The Witness: Yes.

Q. Did you have to pay any medical expenses, for any 123
medical expenses or lodging or food? A. No.

Q. Where did you go to in Miami? A. They took us to the Jackson Memorial Hospital, I and another seaman.

Q. And how long did you stay there? A. We was there four or five days, I believe—I don't know the exact date, but I believe we arrived in Staten Island, New York.

The Court: Let us get this little period clear. For
124 a few days in December, where was he?

Mr. Sardaro: Jackson Memorial Hospital, in Miami.

The Court: And no expenses there for medicine or food or anything else?

The Witness: That is correct.

Q. You left Miami about the 5th or 6th of December? A. Well, somewheres near that.

Q. And you came to New York? A. Came to New York by train.

125 Q. Do you recall the date you arrived in New York? A. I don't know for sure whether it was the 8th or 11th of December. It has been quite a while ago and I have forgotten the exact date of it.

The Court: Was that in New York or Staten Island?

The Witness: Staten Island, New York, yes.

—Q. You came by train? A. That is right.

Q. You arrived at the Pennsylvania Station? A. That is right.

126 Q. How did you go from Pennsylvania Station to Staten Island? A. A Red Cross nurse picked us up in a Red Cross car, because I remember she was a neighbor of Tom Dewey, and she was telling us about her place, and she said, "You are from Lansing, aren't you?" I said, "Yes." She said, "Mr. Dewey is from Owosso," and she was asking a few questions.

Q. Did you incur any expense for the trip from Miami to Staten Island? A. The train fare was taken out of me. It was $56 or $58—I don't know exactly.

Q. Did you spend $56.84 for your railroad fare on the way up? A. Yes. 127

Q. You did not have to pay for any food or other expense on the way up? A. I do not recall whether it was given me meal tickets or we paid for our own meals on the train. I am not sure. I believe we paid for part of our own meals on the train anyway.

Q. If you did spend any money, about what is the amount that you spent? A. Well, it probably would not have been over three or four dollars at the very most—maybe five.

Q. You went to the Stapleton Hospital in Staten Island, that is, the Marine Hospital? A. That is right.

Q. How long were you there? A. I was there until December 21. 128

The Court: The date of arrival at Staten Island is December 8th or 11th?

Mr. Sardaro: December 8th, your Honor, is the correct date.

Mr. Connor: December 8th it must be, your Honor.

The Court: All right, December 8th to December 21st at the Stapleton Marine Hospital.

Q. And on December 21 did you make a request to be released so that you could go home for Christmas? A. I did. They had taken the cast off my leg and they wouldn't release me, only on one condition that I would report back to the Detroit Marine Hospital for further observation. 129

Q. And you traveled from Staten Island to Pennsylvania Station by yourself? A. That is right. I took a taxicab.

Q. And from there you took a train to Detroit? A. To Detroit.

Q. And you arrived in Detroit about when? A. Well,
130 I don't know the exact date. It was a day or two before Christmas.

Q. Well, the doctor gave you permission to leave the hospital? A. That is right.

Q. And from Detroit you went to your home in Lansing? A. That is correct.

Q. You had Christmas with your family? A. Yes.

Q. When did you report to the Detroit Marine Hospital? A. Well, when they released me they gave me a six weeks convalescing period.

131 The Court: What is the date that you reported at the Detroit Hospital?

The Witness: I would not know that exactly. It was probably the last of January.

(Discussion.)

The Court: It is a fact, Mr. Warren, that from the time you arrived home for Christmas, you stayed there until December 28, 1944?

The Witness: Yes.

The Court: And it was about December 28th that
132 you reported at the United States Marine Hospital at Detroit, wasn't it?

The Witness: January 28th, don't you mean? December 28th is only about three days after Christmas. It was January 28th.

Q. Some time in the latter part of January you went to the Detroit Hospital for observation, is that correct? A. I did.

The Court: In the meantime you were home, weren't you? 133

The Witness: That is correct.

The Court: Did you have any expense for doctors or food while you were home?

The Witness: Well, I had an extra expense naturally. I couldn't get around. Everywhere I went I had to ride a taxicab. Well, that probably is off the record so far as that is concerned, but I had to soak my leg in liniment and massage it and I made a few trips to a doctor for massage.

The Court: What would you estimate the expense for the doctors and medicines to be during this sojourn at your home? 134

The Witness: Well, I have made the previous statement that said $100, but when I went to observe it a little closer I see that it probably wouldn't exceed $50.

Mr. Connor: At this point, your Honor, perhaps I should make your Honor understand. I have an objection to any private doctor's charges on the theory that the Marine Hospital is the place where merchant seamen receive their treatment, and if they choose to go outside— 135

Mr. Sardaro: If the Marine Hospital is accessible.

Mr. Connor: —it is at their own expense.

y the Court:

Q. Where was your home? A. In Lansing.

Q. In Lansing, Michigan? A. That is correct.

Q. And how far was that from Detroit? A. Well, that 90 miles, approximately.

Q. Well if you, let us assume, paid $3 to a doctor for this
136 treatment that you got in Lansing, the fare to Detroit and back would be more than double that, including your taxi fares? A. It would be double that easily.

The Court: I will overrule the objection.

Q. But you did not have any expense for food. You just lived at home with your parents, the way everybody else would? A. Well, I lived home with my family; naturally I have to pay for it and pay rent the same as any other man would do.

137 Q. Why didn't you say so? I am just asking you that. What did you pay home there? A. Well, at the time we was paying $30 a month for an apartment, and the food was probably was about $10 a week.

Q. Were you with your mother and father? A. No, with my wife.

Q. With your wife? A. Yes.

Q. So that the expense you had for your food and upkeep there was the ordinary routine and the general expense of buying the food and the ordinary expense of maintaining the apartment? A. Yes.

138 *By Mr. Sardaro:*

Q. How long did you live there under those circumstances? For what period of time? A. Oh, since before I went into the Merchant Marine, I guess.

Q. You misunderstand me. From December 21 when you left the Staten Island Hospital until what period of time did you live in the apartment with your wife and family? A. Well, the apartment was kept and maintained

until March or April. I was in the hospital, I guess, when she closed the apartment. 139

Q. Throughout this period of time that you were in the hospital or that you were out of the hospital, between December and February, you stayed at home with your wife in that apartment? A. That is right.

Q. And you paid the rent? A. Yes.

Q. How much was the rent? A. $30 a month.

Q. And how much did you pay for your food? A. Well, that would be hard to say. When you buy the food for the family you buy whatever it takes, that's all.

Q. How many are there in the family? A. Three. 140

Q. That is including yourself? A. That is correct.

Q. What was the average weekly expense for food? A. Oh, probably $15 for food and $10 for rent—probably $25 a week.

The Court: That is for the family, the $25 a week for the family?

The Witness: Well, they wasn't there most of the time. I was keeping the place up for myself and I was eating out a lot, you know, but the apartment was maintained and it was there whenever they wanted to use it. 141

The Court: So you met the $25 a week for yourself?

The Witness: Practically. Most of it went for myself.

Q. Oh, Mr. Warren, we would like to get on the record if we possibly can an idea of how much it cost for you alone to

live during this period from December 21 to February 27
142 when you went back into the hospital. We would like to have that on a daily basis. About how much did you spend per day for your food and lodging? A. For food and lodging I should calculate $20 to $25 per week—probably twenty-five.

Q. That is for yourself alone? A. That is correct.

Q. Now on February 27th you went to the Detroit Marine Hospital for an operation? A. That is right.

Q. And how long were you there? A. I was there until May 28th, I believe.

Q. You did not pay for any medical expenses or food or
143 lodging while you were there, did you? A. No, not for myself, because it was furnished there.

Q. Then you left the Detroit Hospital sometime on May 28th or May 29th? A. I believe it was May 28th. I wouldn't say definitely or positively on that.

Mr. Sardaro: May I at this time, your Honor, offer in evidence the abstract of the Detroit Hospital?

The Court: Any objection?

Mr. Connor: I haven't any real objection except this, your Honor, that this is a statement of what somebody thinks those hospital records show and
144 what I would like to have done, if possible, is to have the original records offered when they arrive. This is only a copy of what some parts of the record show.

The Court: I am a little puzzled as to what the point of it is. Does it matter at all whether he was treated properly or improperly?

Mr. Connor: No, sir, that is not in the case at all.

Mr. Sardaro: All I am trying to prove, your Honor, is the fact that he received medical treatment and was disabled. That is all I want to prove, and that is all there is in the case. 145

The Court: I will receive this subject to further elucidation when the records arrive, if they arrive before the case is closed.

(Marked Libelant's Exhibit 1.)

Q. You left the United States Marine Hospital in Detroit on what date, about? A. The 28th of May, 1945.

Q. And from that, was any recommendation made as to when you were supposed to return to work? A. Well not exactly. They said that I was in shape to go to work whenever I could stand it, and I did go to work a month later on a light job where there wasn't much walking to do. 146

Q. Do you recall the date that you went to work? A. It was around the 1st of July, I guess.

Q. You did not work at all between the time you left the hospital to the 1st of July? A. That is right.

Q. Now what was the cost to you to live from May 29th to July 1st, per day or per week? A. Well, at that time I was living with my brother and eating all my meals out, so I presume that would probably figure about three or three-and-a-half a day for meals, and about 75 cents to a dollar a day for a room. Six days would be how much a day? 147

Q. I beg pardon? A. $6 per week would be about how much a day? That will be roughly 85 to 90 cents a day.

Q. You paid $6 a week for lodging and about $3.50 a day for food? A. Yes.

Q. Now in the latter part of January you went to the
148 Detroit Hospital for observation? A. That is correct.

Mr. Connor: This is January 1945?
Mr. Sardaro: 1945.

Q. And did they suggest to you or did you request that you be sent back to New York for further observation here?

Mr. Connor: I object to that, if your Honor pleases, as not binding.
The Court: Objection overruled.

149

A. Why, I asked him what they thought about it, if he had any objections if I checked back with the New York Hospital and he said, "No, I would like to have you do it." He said, "If you are going to be there I would be pleased to have you do it."

The Court: If you are going where—to New York?
The Witness: To New York.

Q. And did you come to New York? A. I came to New York, yes.

150 Q. And you went to the Stapleton Hospital? A. To the Stapleton Hospital for an x-ray and observation again.

Q. And there what did they tell you? A. Exactly the same thing, and they said that they would do it there, or I could go back to Detroit and be closer to my home—either one I chose.

Q. And you went back to Detroit? A. I went back to Detroit.

Q. How much did it cost you for railroad fare from De-
oit to New York and back? 151

Mr. Connor: Well, I object to that, if your Honor please. I don't mind taking the figure, but I object to this—

The Court: You see, you will have all your rights preserved to object to any of these items later.

Mr. Connor: That is all right.

The Court: However that may be, you have noted your objection and that will serve to make a record of it. I will overrule the objection without intending at this time to pass upon the question that I will have 152
to pass on at the close of the case, namely, as to specific amounts and so on.

Q. Did you spend $25.86 for the railroad fare, round
ip? A. I believe that is what it was at that time. It is
ore now but I think it was $25.86 for a round trip ticket to
etroit—from Detroit to New York.

Q. Mr. Warren, from October 30 to the present time have
ou been paid the wages for the period, that is, from Octo-
er 30th to the end of the voyage of the ship? A. Pardon?

Q. Have you been paid any wages for the period after 153
ctober 30, 1944? A. No.

Mr. Sardaro: I believe counsel will stipulate that the ship paid off at New York on December 23, 1944.

Mr. Connor: That is right.

Mr. Sardaro: And I have calculated the figures, the unearned wages for the period October 30th to December 23, 1944, at the rate of $87.50 per month to be $157.58.

Q. Mr. Warren, in the course of your service on the ship
154 were you asked to render additional service—to serve additional people? A. Yes. We had—

Mr. Connor: Before we get into this point, your Honor, I am going to object to that as not part of the pleadings.

The Court: I do not understand what it is about.

Mr. Connor: It is a claim for overtime.

The Court: Overtime?

Mr. Connor: Wages for overtime, yes. The libel does not disclose any such claim. As a matter of
155 fact if there were any such valid claim I would not be here defending it.

The Court: Let me just take a glance at the libel. This is overtime that he claims he would have earned if he had been back on the ship?

Mr. Connor: No. This is time that he says he did earn.

The Court: Overtime he earned before he got hurt?

Mr. Connor: Yes.

The Court: That is out. I will sustain the objection, unless I find it in the libel, which I gather I
156 won't find, but, however, just let me look. (Examining.)

Mr. Sardaro: It is not in the libel, your Honor, and I will withdraw my question.

The Court: All right.

Mr Sardaro: I offer in evidence the notice of claim presented by the libelant to the American South African Line, Inc., general agent of the United States, and to the chief adjustor, War Shipping Ad-

ministration, pursuant to the provisions of Public Law 17. 157

Mr. Connor: I have no objection, your Honor.

The Court: That is admitted in the pleadings as a matter of fact, isn't it?

Mr. Connor: The receipt of it is admitted, yes.

The Court: I will receive it.

(Marked Libelant's Exhibit 2.)

Mr. Sardaro. Mr. Connor, will you stipulate on the record that the ship has been in New York during the pendency of this lawsuit?

Mr. Connor: I have the answers to the interrogatories in which it is so stated. 158

Mr. Sardaro: I do not want to use them unless you want me to.

Mr. Connor: Surely. There is no doubt about the fact that this vessel, after the pendency of the libel, came to New York. You see, we have the jurisdictional point.

The Court: I know you have, so that at some time during the pendency of this proceeding the vessel was in the territorial waters of the United States and part of the Southern District of New York. 159

Mr. Connor: Yes.

The Court: And Mr. Sardaro claims that is all he has to show, and you say that is not all he has to show.

Mr. Connor: Yes.

Mr. Sardaro: And may I also bring to your Honor's attention the fact that the American South African Line is a resident of this district and a party to this action, and can only be sued in this district.

Mr. Connor: That does not relate to the point we are making here. It relates only to the United States of America. This suit has to be commenced in a district in which the vessel is found or in which the libelant resides; because there is some other residency in the case does not change it.

The Court: Why isn't that so, Mr. Sardaro?

Mr. Sardaro: I bring your Honor's attention to the case of Hong v. United States where a similar situation existed, and Judge Hulbert held that the Court had jurisdiction of the parties.

The Court: You find the page and hand it up to me. In the meantime we will take a ten-minute recess.

(Short recess.)

Mr. Sardaro: I should like to put in evidence, your Honor, the clinical abstract from the Staten Island Hospital.

Mr. Connor: As to that, here is the original record. I suggest, if your Honor please, that the original record go in, the one that we have.

Mr. Sardaro: I have not examined it. All I am offering this for is for the purpose of showing that he was told to lay off for six weeks and then report back.

Mr. Connor: I think this shows it anyway, if that is what you have in mind.

The Court: When was he told to lay off for six weeks?

Mr. Sardaro: On December 21, at the time he left the hospital.

Mr. Connor: That appears in the original record.

Mr. Sardaro: Will you stipulate then, for the record, that the record shows that he was told— 163

Mr. Connor: I will put the whole record in. I haven't read it.

Mr. Sardaro: I haven't read it and I am hesitant about putting it in without reading it.

The Court: We have proof here up to July 1, 1945. You seem to be going back, with this paper you are now offering, to some prior period, is that right?

Mr. Sardaro: That is right.

The Court: What is the prior period—at the time he left the Marine Hospital on May 28th?

Mr. Sardaro: The time he left on December 21 until he re-entered on February 27, 1945. 164

There are only two periods involved. Maintenance is claimed from December 21, 1944, to February 27, 1945, and from May 29, 1945 to July 1, 1945. Those are the only two periods involved.

The Court: I see that we are now back to the time that he left the hospital in Staten Island to go to Detroit.

Mr. Sardaro: That is right.

The Court: December 21, 1944, is that right?

Mr. Sardaro: Yes. 165

The Court: Let me see the paper that you are offering.

(Mr. Sardaro hands paper to Court.)

The Court: You prefer this paper to the original record that Mr. Connor has there, I take it?

Mr. Sardaro: I do, your Honor.

The Court: I will receive this, and of course Mr. Connor may cross examine or put in such other papers as he wants to later on.

166

(Marked Libelant's Exhibit 3.)

By Mr. Sardaro:

Q. Mr. Warren, will you please tell us the circumstances under which you joined the Anna Howard Shaw? A. The circumstances?

Q. Well, did you go the Union Hall? A. Yes.

Q. And did you receive a slip to report to the ship? A. That is correct.

167

Q. Do you recall the date? A. No, but I have the original slip right in my pocket. Strange as it seems I found it in my papers.

Q. Let me see it. A. Right there. It happens to be the original slip from the Union Hall (handing).

Mr. Sardaro: It is not material.

The Court: Then don't put it in evidence. I do not see that it has any bearing on the case.

Q. Mr. Warren, at the time you were given this slip were you told to report to the ship?

168

Mr. Connor: If your Honor please, so far as I know this is developing testimony of what was said to him in the Union Hall. I do not see how it can bind us.

The Court: He has not come to that. So far he said that he—

Mr. Connor: Well, the last question was what he was told. 169

The Court: Suppose he was told or he wasn't told. I cannot see what difference it makes. He was undoubtedly on board the ship.

Mr. Sardaro: The question was raised by Mr. Connor that the South African Line may not be liable because it was the agent of the United States.

The Court: Very well. I will overrule the objection.

Mr. Sardaro: I will say this, that the American South African Line is in the shoes of the United States and is as much responsible for the maintenance and care of this man as is the United States. That is what I want to prove from this man, the fact of how he came to be employed. Other than that I have no reason to offer the testimony. 170

The Court: So far the record is barren of any proof with relation to this respondent, the American South African Line, Inc. I should think it would be more important for you to show what the relationship of that respondent was to the vessel than merely to show that this man reported on the ship, which he already testified he was there as a messman; but I am not disposed to limit you at all. If you want to put the slip in evidence go ahead and put it in. 171

Mr. Sardaro: The slip is of no material importance, your Honor.

The Court: Very well. Do you have something in your admissions of the answers which will show the relationship of the American South African Line, Inc.?

172 Mr. Sardaro: The answer of the respondents admits that the American South African Line is the agent of the United States.

The Court: And the general agent of the vessel.

Mr. Sardaro: And the general agent of the vessel.

Mr. Connor: I would like to have my attention directed to that. We were what is technically known as a general agent under a contract but we were not the general agent of the United States in the generally accepted sense of the word. There has been a great deal of dispute about this, your Honor, and this is one of the reasons I did not want to discuss the other
173 legal matter that came up before. There are two cases dealing with that situation in the Supreme Court, namely, the liability of the general agent, and that has a specific meaning with regard to the rights of seamen. One is the case of—

The Court: Yes, I have been trying cases where the contract was put in evidence. Have you a contract here so that we can put it in evidence?

Mr. Sardaro: I do not have it.

Mr. Connor: I do not have it. We have denied, so far as the American South African Line is concerned,
174 ownership, operation and control of the vessel and employment of the libelant. It seems to me it is up to the libelant—the United States admits it employed him. It admits it owned and operated the vessel.

The Court: Well, I am not going to throw this case out on some technicality when some proof can be supplied readily that will suffice to hold one of the respondents. If we can have that contract in, we will get it.

Mr. Connor: I am not suggesting that your Honor throw it out on any technicality. I hope your Honor won't feel because I have said that that I am relying on any technicality. 175

The Court: Well, I confess that impression has taken a certain lodgement in my mind.

Mr. Connor: I wish to disabuse your Honor of that because that is not so. There is a definite liability on the part of the ship and its owner and the employer of a seaman for maintenance. He has his remedy against that owner and employer. My position here is that he has that person in the form of the United States of America; that the American South African Line does not have that liability, and if liability is fastened upon it, it is not put upon the right person. It is put upon somebody who does not have the responsibility. It is put upon that person on the theory that mere title of general agency makes it a different entity before the law than it was. We maintain— 176

The Court: All I am saying is if it is a question of some proof we will take the time necessary to get the proof, and that proof apparently is a contract. Mr. Sardaro says he has not got a copy of that contract, but he can readily get one in evidence. 177

Mr. Connor: Your Honor, I am not trying to conceal the contract, no. The contract is a standard one. The Government got out a book of some 30 or 40 contracts, one of which is known as a general agency contract. It is a contract that existed between this Steamship Company and the United States and every other steamship company. Your Honor can

get the exact same contract by getting a book of it
178 issued by the Government during the war, which printed all the contracts.

The Court: Why don't you stipulate that?

Mr. Sardaro: May I suggest this: I have a copy of the book that Mr. Connor talks about. I know exactly what page that agreement is on—page 326-337. It is called a G.A.A. Contract.

I will be glad to stipulate with counsel—

The Court: This will take care of it:

It is stipulated by the respective advocates that
179 the contract just referred to be deemed in evidence, and that pursuant to the terms of that contract the American South African Line, Inc., at the times referred to in the testimony here, operated the S.S. Anna Howard Shaw.

Mr. Connor: I have difficulty with that, your Honor. We will concede that we were general agent under the terms of the general agency agreement, but we do not admit operation.

Mr. Sardaro: Will you admit that you handled the business of the vessel pursuant to the contract?

Mr. Connor: We will admit that the terms of the
180 contract as they have been incorporated bound us. I will produce the contract, and whatever your Honor says was our responsibility, based on that contract, of course I am bound to accept, but it is not operation in the true sense of the word. Let me say this to your Honor so that you will see what I am talking about: Under the terms of the contract the general agent was required to get a master of the vessel. Now that master was thereupon chosen by the United

States of America, and that master selected the crew, and the contract provides that the crew shall be em- 181
ployees of the United States of America. The contract was drawn specifically so that the general agent would not be the employer of the members of the crew. They had that very thought in mind when the contract was drawn to avoid this very type of litigation. The Supreme Court of the United States confirmed a decision in the Court of Appeals. When I say that I mean the New York Court of Appeals in the Calderaldo case held that they were not the employers of the crew on the vessel.

Mr. Sardaro: That is not so, your Honor. 182

The Court: Let us not spend too much time arguing that. You have both agreed that the contract be deemed in evidence, haven't you?

Mr. Connor: Yes.

The Court: You also, Mr. Sardaro?

Mr. Sardaro: Yes, I do.

The Court: What they did under the contract is conceded to be what the contract provided they were to do—isn't that right?

Mr. Connor: Yes, sir.

The Court: So that the interpretation of that we 183
can take up later.

Mr. Sardaro: Right.

The Court: But it is now in evidence by stipulation that there was this contract, and that whatever the contract provided should be the duties of the American South African Line, Inc., the American South African Line did.

Mr. Connor: I will get the actual contract.

184 The Court: All right.

Mr. Sardaro: I have two copies of that book, you Honor, and if you want I will be glad to bring them in here.

The Court: I am just concerned at the moment that this case should not be dismissed through some failure of proof that is readily available, and if some dispute comes up later about this that might result in a dismissal on some point that can be cured by evidence, I will tell you gentlemen now that I am going to see that that evidence gets in; but if fundamentally

185 the facts require dismissal, why I will have to dismiss.

By Mr. Sardaro:

Q. Mr. Warren, when you reported to the ship did you know who you were going to work for? A. Yes. I knew I was going on the Anna Howard Shaw for a company by the name of American South African Lines.

Mr. Sardaro: You may inquire.

186 *Cross Examination by Mr. Connor*:

Q. I do not think, Mr. Warren, that you told us where you live now. Will you do that? A. I live in Lansing, Michigan. Do you want the street address, too?

Q. Yes, please. A. 528 South Grand, Lansing, Michigan.

Q. At the time that you joined the ship Anna Howard Shaw, where did you live? A. 324 Howell Street in the same city.

Q. Did you continue to remain there after April of 1945? A. No. After April of 1945, no, the apartment in the house belonged to my brother and he sold it and bought another place, and that is why the residence was changed. 187

Q. In any event, from the time that you joined this vessel until the time, today, you have lived in the State of Michigan, is that correct? A. That is correct.

Q. And you regard that State as your residence? A. After all, it is a possession of the United States, isn't it?

Q. But nonetheless it is where— A. That is where I live.

Q. —your home is? A. And where I intend to live, for the time being at least. 188

Q. Would you have any idea, Mr. Warren, about how far it was from the time that you landed from your vessel in Magnolia, Italy, to the place you had your accident? A. Well, that would depend on which way you want the distance. Do you want the distance as we traveled it?

Q. Yes. A. Or the distance as a straight line?

Q. No. Take it as the distance you traveled first. A. The distance as we traveled it, perhaps, from the shoreline, three miles. That is a rough calculation. I can't get it any closer than that calculation.

Q. During the time that you were going from the place where you landed to the place where you had your accident, were you walking along public streets? A. Yes. We was up one street and down the other one, and window shopping, looking at everything we could see out of curiosity. 189

Q. And along this street you saw either all local residents, did you, and vehicle traffic? A. Well, there was very little vehicle traffic. I did not see anything. I saw

streetcars with no electricity to run them, and most every-
190 body was foot pedestrians.

Q. But there were shops and stores and private houses all along the route? A. There was all types of places, just like ordinary towns—there would be, and ravished by war, and not in too good condition any of them.

Q. Did you see some areas which were bombed out, houses which were destroyed by warfare, or bombs? A. No, there was some slight evidences of the war, but most of it had been repaired.

Q. Did you see some houses which were partially de-
stroyed or rubble about the street? A. No. The streets
191 were pretty well cleaned up. You could see houses and chimneys knocked off of them and one thing and another, but the rubble had been cleaned off the streets.

Q. Let me put it to you this way: there was some evidence that a war had been going on in the immediate vicinity of that place? A. Well, the largest evidence was the ravished, poor people with hardly enough food or clothing.

Q. I am talking about the structures. A. Of course the structures, I never saw it before the war, but you could see things in your mind, you would figure was caused by the war.

192 Q. If I understand you correctly, you landed at a small pier at the city or town of Magnolia? A. That was what we was told the name of the town was, that is all we know.

Q. In any event it was a small pier— A. It was a small village, perhaps comparable to a suburb of one of our cities.

Q. I am trying to find out what kind of a structure did you land at. Did you beach your boat and then walk? A. No, nothing of that kind. We went up alongside of a shallow dock and stepped up on it.

Q. Were there any military personnel around there at the time? A. Nothing but Army MP's. 193

Q. American soliders? A. That is right.

Q. I want to jump a little bit ahead of myself and go to this place where you said it was something like a U.S.O. You do not contend that this place where you were at was any place run by the United States of America or a U.S.O.? A. No. I said it was a place probably comparable to what we would have as a U.S.O. I mean that is what I would fix it at because the village people on the Italian streets weren't even dressed to go to a place of that type, and the people that were in there were American soldiers and people fairly well dressed. You can pass your judgment on that that it 194 wasn't a place of the lowest class type, and the building was in fair condition, as I recall it, a good hardwood floor and fair condition to dance on.

Q. The people who were sitting at your table, I think you said were Italians? A. Well, there was a couple of Italians.

Q. Were those— A. There was one Italian woman there that was a school teacher, and she talked English, and the rest of them, of course we couldn't talk to, but I was talking to her.

Q. Were the other people who were at your table ladies, 195 too? A. They were ladies that the boys had been dancing with.

Q. You danced with these ladies yourself? A. Well, I do not recall whether I danced with all of them or not, but I danced with three or four different ones.

Q. Were you and your two companions the only men from the merchant marine in that establishment at that time? A. I didn't see any others. The rest of them were Army

boys, I believe, Army or paratroopers, the rest of the
196 Americans.

Q. Were there any signs posted anywhere near the building saying that that place was off limits for Army personnel? A. There did not seem to be because if it had been off limits for Army, the MPs outside in the jeep would sure have picked them up and took them outside in a hurry.

The Court: There were a lot of American soldiers in there?

The Witness: Well, there wasn't a lot of them. There were five or six, I judge, but outside in the
197 street there stood a jeep with a couple of MPs in it, and I talked to them casually.

Q. You said that after you were there an hour or so you noticed that in some other room there were some doors which faced the bay or the water, it that so? A. That is correct.

Q. Did you go alone into that other room? A. Well, with the bunch I was with I did, but there were other people in there, which were Italian people that I couldn't talk to and I paid no attention to. There was probably half a dozen
198 walking around in there.

Q. If I understand what you said before, you saw large French doors which faced on the water? A. That is right.

Q. Were those doors open or closed when you approached them? A. They were open and the breeze was blowing in. Supposing that wall right there (indicating) faces the sea water, and then your panels there would open up, it would be something comparable to that.

Q. Was the floor in that room wooden? A. Yes, it was.

Q. And then beyond that opening there was a ledge, is that what you say? A. Yes, a slight ledge, yes. 199

Q. Did you tell us how wide that ledge was? A. I couldn't tell you exactly, only by calculation.

Q. Just approximately. A. I judge 2-½ to 3 feet.

Q. What was the ledge constructed of, wood or stone? A. It was probably the same type of material as the—I don't recall whether it was constructed of wood or stone or whether the floor had a separation in it.

Q. And you say that out there you saw some sort of a column which was constructed of masonry of some sort? A. Well, they were regular parts of the building. Most 200 every building has masonry posts in them.

Q. You think this was a decorative column that was in front on the building?

The Court: Not in front of the building; it was this window.

A. That would be the rear of the building facing the sea, wouldn't it? The front of it would be on the street.

Q. Well, I don't know. But you say there was no railing around the outside? A. There was no railing, no.

Q. And when you went out there did you go out with any 201 companions—I mean a girl companion, or did you go out alone? A. No, I was just looking out there alone. There were other people going over and looking and walking away. I wasn't interested in them. I was looking at the water hit the stone there and the spray over it. That is a beautiful scenery there so far as that spray—you can see the Isle of Capri off to the left and a lot of historic places, if you know what they are.

Q. As I understand it, you actually walked out on the
202 ledge? A. That is right, and stood there for a few seconds looking around.

Q. You mean you stood inside the room or you went out on the ledge? A. I stood in the tracks where I fell, probably for about three or four minutes, or maybe five minutes, before I took a hold of this iron and looked over and it pulled loose so easily that it was such a quick surprise that I couldn't recover myself.

Q. I still do not know whether before you took a hold of that pipe, or whatever it was, you were standing within the walls of the room or whether you were out on the ledge.
203 A. Well, I don't know exactly either. If you were standing here with something else on your mind would you observe the exact structure of everything around? I am sure I wouldn't.

Q. What you are telling me now, I take it, is that you did not notice whether you were in the room or out on the ledge? A. I am only telling you what I remember and what I can recall.

Q. I anticipate that, but do you recall this particularly, whether you were in the room or out on the ledge? A. Well, I was possibly outside of the door entrance which
204 would be the edge of the room, probably 2-½ to 3 feet. That is what you would call the edge of the room. Would you call the edge of the building the edge of that room?

Q. I am trying to distinguish between the doorway and the ledge itself and find out whether you were within the doorway or whether you were actually outside on the ledge? A. Perhaps I was outside the door a couple of feet.

Q. That is your best recollection? A. That is correct, because I had something else in my mind. I wasn't even paying any attention to that.

Q. We will come to that in a minute. What was this thing that you say you took a hold of? A. Well, to be honest with you I don't know. It would be comparable to a lightning arrester or lightning rod on one of our buildings. 205

Q. You mean a thin metal pipe of some kind? A. Well, a pipe, probably about a half inch in circumference, and the section that pulled off was 8 or 10 feet long, maybe 12.

Q. And did that go up above the window or the doorway, rather? A. It ran up the post on the side of which I was standing.

Q. Did you notice whether or not it was fastened to the post at all? A. It would have held it up there, wouldn't it? 206

Q. You see, you are asking me questions, Mr. Warren. Unfortunately you are the one who has to answer them. What do you say about it? Were there any brackets up there against the post? A. It wouldn't have stood up in that wind if it hadn't had brackets, that is sure.

Q. You still haven't told us whether there were brackets. A. There were brackets on it.

Q. What kind of brackets were they? A. Some kind of metal brackets fastened in the masonry, and they probably had been fastened too long by the way they come loose.

Q. Did you make any inspection of this pipe or the brackets before you took a hold of it? 207

Mr. Sardaro: If your Honor pleases, I am going to object to that. I think that Mr. Connor is going far afield in this cross examination. It has no bearing upon the issues in the case.

The Court: Well, it puzzles me a little bit, too, but I am not disposed to interfere with cross examination. I will overrule the objection.

Mr. Connor: Will you repeat the question?

Q. (Read.) A. Why, just casually. As you would glance
208 on it, if it would look all right, you wouldn't make any note of it hanging loose at a glance. Naturally you wouldn't make a very close observation.

Q. It was not something that you thought was put there for the purpose of taking a hold of by the hand? A. Well, it may have been there for that purpose.

Q. You do not know whether it was there for that purpose? A. I do not know whether it was there for that purpose, but it may have been something of that type rather than a lightning rod or something of that type.

209 Q. Was there anything about the structure which would lead you to suppose that it was there because somebody want to hold on to it rather than for some other reason? A. On second thought it seemed to have—it went nowhere near the length of the floor. It was probably more of a hand-hold than anything else.

Q. And you think because it went from the floor of the ledge up above you that it was something to hold on to? A. It possibly was for that purpose more than any other reason.

Q. What you are telling us now, I take it, is something that you have considered this structure and this attach-
210 ment to the post and you now think it may have been there to hold on to? A. From your remarks and one thing or another you bring out points that I did not think of before, and perhaps maybe you are more correct than my first observation.

Q. You understand, Mr. Warren, I am not giving any testimony here; I am trying to find out the facts. A. Well, that is true. That is probably what you are after, but you do give a person ideas from the questions you ask.

Q. You say that you were in this place about an hour or an hour and a half before this accident happened? A. I really did not look at my watch or anything of that type but we couldn't have been there more than an hour to an hour and a half at the very limit. 211

Q. From what I understand what you said before, you had been in one wine shop of some sort and had had part of a 12-ounce bottle of wine, is that correct? A. That is correct.

Q. And then you say that you had another similar quantity of it in this place where you had your accident? A. That is correct.

Q. So that altogether you had something like 8 ounces of wine? A. That would probably be a large estimate. 212

Q. Did that wine have any effect upon you so as to make you unstable on your feet so that you could not walk correctly? A. No.

Q. Have you ever had a little too much to drink? A. Why, I recall once or twice, but it has been years ago.

Q. Did you have too much to drink on this occasion? A. No.

Q. Did you get actually drunk from alcohol on this occasion? A. No.

Q. Do you know that the Army Hospital records has you marked as being in a condition of acute alcoholism on this very day when you had your accident? A. I don't know how that could be, sir. 213

Q. Do you know that the Stapleton Marine Hospital records carries a statement that your accident came about when you were under the influence of acute alcoholism? A. I don't know how that could be either unless it is just information that was passed along from one hospital to the other.

Q. Do you say that the Army doctors put down acute
214 alcoholism when it wasn't so?

Mr. Sardaro: If your Honor please, I object to the form of the question and also—

The Court: I will sustain that objection.

Q. Let me see if this helps you on your recollection, Mr. Warren. I am now reading from a part of the United States Marine Hospital record at Stapleton, Staten Island, which evidently comes from the—transferred with the patient from Italy.

215

Mr. Sardaro: May I suggest, your Honor—

Q. This is dated October 30, 1944, and the hour is 1830. "Treatment given at about 1700 hours"—

Mr. Sardaro: If your Honor please, may I register my objection first? I object to Mr. Connor reading any part of a record not in evidence—

The Court: Well, until he finishes his question I suppose I should not rule on it. But I suppose that is a valid objection.

216

Mr. Connor: If that is the only objection I offer all these hospital records in evidence. There is a case in this circuit, your Honor—

The Court: You do not have to argue it. He is not going to object and they are all going right in.

We will call this the entire file of the hospital records from the United States Marine Hospital at Stapleton.

Mr. Connor: Yes.

217

(Marked Respondents' Exhibit A.)

The Court: Very well. You may pursue your inquiry.

Q. I am now reading from the record of the 118th Station Hospital, signed by Captain Harold C. Hayne:

"Treatment given. About 5 miles north of Naples at about 1700 hours, 30th October 1944, alcoholism, acute. Patient treated at 225 Station Hospital but 218
sent him here. S"—

with a line over it. I think it means "without"—

"any amt or record of any kind."

Mr. Sardaro: May I see it?
Mr. Connor: Surely (handing).

Q. Does that statement in the record, Mr. Warren, help you to remember how much alcohol you consumed that day? A. That only convinces me of one thing, that I never seen a 219
doctor for three days after I was in that hospital and I don't know how a man could observe a man and sign that copy or a slip of that type without ever seeing him.

Q. You see, you have not answered the question I put to you. I say, does this record help your recollection any as to how much alcohol you consumed that day? A. Well, I am not an acute drinker and I never have been, and I didn't consume any amount in excess of what I told you that day.

The Court: You weren't even mildly under the
220 influence?

The Witness: I would say not, unless they give me morphine—I asked for morphine when my leg was hurting, I was laying there and I got wet from sea water, and it splashed up over me and I asked for morphine, and unless they took it from being dopey, from morphine, that I was drunk, and I was handled by sergeants and Italian stretcher bearers in Naples and I never saw a doctor for three days. In fact, even a sergeant and a corporal put the cast on my leg.

221

Q. Now on October 30th that is the time you had your accident, isn't that correct? A. That is correct.

Q. And it happened about 1700 hours, didn't it, according to Army time? A. That would probably be somewhere in there.

Q. That would be about five o'clock, wouldn't it? A. Well, they could get that time off because I really didn't get to the hospital until 11 or 12 o'clock at night and I was practically froze at night and everything else.

The Court: Does that say 1650 on there, Mr. Con-
222 nor?

Mr. Connor: You mean the hour?

The Court: Yes.

Mr. Connor: 1700 it says there.

The Court: What time would that be?

Mr. Sardaro: 5 o'clock.

The Court: I noticed another one here said 1630.

Mr. Sardaro: That would be 4:30.

The Court: When I say "another one" I mean another one of the papers taken from this little envelope which you have referred to as being transmitted from overseas, and which contains the papers that you have been examining the witness about. 223

Mr. Connor: I think I ought to specially have this marked as A-1 so that we can distinguish it.

The Court: Yes.

(Marked Respondents' Exhibit A-1.)

Mr. Connor: If your Honor please, I have not seen these records before. This is the first time I ever laid eyes on them. 224

The Court: You may glance at them.

Mr. Connor: I do not want your Honor to think I was delaying.

The Court: No, you are not delaying anything.

Q. Where was it that you say you were taken to after the jeep picked you up? A. I don't have any idea but I ended up five or six hours later in the 118th Evacuation Hospital.

Q. Did you get into the hospital about eight o'clock that night? A. Why, as I say, I asked for morphine to cut that pain down. 225

Q. You see, Mr. Warren, you and I are not getting along well together. What I asked you about was did you get to the hospital at 8 o'clock that night, and you are telling me about some morphine.

Let me ask you that again: did you get to the hospital at about 8 o'clock that night? A. Why, I don't believe it was until later in the evening, 10.30 or 11.

Q. I am looking at a record here, Mr. Warren, from that
226 same overseas hospital, which indicates you got into the hospital at 8 p.m. A. Well, I probably lay down outside on a stretcher for two or three hours. I know it was about 10.30 or 11 o'clock before I got to bed, and I was so blooming cold over there, I put blankets over my sweater to keep from freezing to death.

Q. Wasn't it 11 a.m. the next morning before you got any morphine? A. No.

Q. Well, if the record indicates that do you think the record is wrong? A. I did definitely, because I asked the
227 Army boys and I remember them breaking a tube and sticking morphine in my arm while I was back in the jeep.

Q. And you say that you got the morphine in the jeep? A. That is what I asked for. I said, "This pain is so bad that I can't stand it. Do you have any morphine?" And I remember them breaking a glass tube and shoving morphine in my right arm.

Q. When was it that the pain got so severe? A. I don't know that it was any more severe than it was all the time.

Q. Didn't you tell us in your direct examination that you could have gotten up and walked but your buddies wouldn't let you? Isn't that what you said before? A. That is cor-
228 rect. If I had one leg—if I could find something to hold on to.

Q. I think what you were trying to tell us before, wasn't it, you probably were able to walk without having a litter brought to you? A. Well, I probably miscalculated slightly on that. You know, you always think you can do things you can't after you get hurt.

(Discussion re adjournment.)

The Court: We will adjourn until 10.30 tomorrow morning. 229

(Adjourned to October 30, 1947, at 10.30 a. m.)

New York, October 30, 1947;
10.30 o'clock a. m.

(Trial resumed.)

(Discussion.) 230

WALTER K. WARREN, resumed the stand.

Cross Examination by Mr. Connor (Continued):

Q. I think you told us yesterday, Mr. Warren, that it was three days before you saw a doctor after your accident; is that so? A. Well, it was quite a good while anyway.

Q. You see, you are not going to answer the question again.

The Court: Yes. You will have to answer these questions. I let you fool around all you wanted to yesterday. Now your answer is that you did say that yesterday or you didn't? 231

The Witness: Yes, I did.

Q. When did you get the plast cast put on your leg? A. Well, two or three days afterward. They let the swelling go down first some.

Q. Would it surprise you to know that the records of
232 the Army Hospital show that the cast was put on on the 31st of October, the day after your accident? A. It may have been the day afterward but I thought they waited another day. I am not sure.

Q. You are not suggesting that your leg was set and a cast put on by somebody other than a doctor?

Mr. Sardaro: If your Honor please, I object to that.

A. That is right.

233

The Court: He did say that. He said it was placed on by a sergeant or a corporal.

The Witness: A sergeant or a corporal, and I never saw a doctor until the day after the cast was put on.

The Court: That is what he said yesterday.

Q. Now do you remember when you were sent out of that first Army Hospital you were transferred to Casablanca? A. That is correct.

Q. And you were transferred with several other men,
234 were you? A. Yes.

Q. Were they merchant mariners like yourself or were they Army or Navy personnel? A. They were all Army personnel, I think, but one other merchant seaman.

Q. When you went to Casablanca you first went to another Army Base or Medical Base, didn't you? A. Yes, the 56th Station Hospital.

Q. When you got in there was any examination made of you? A. I don't recollect it, no; I don't believe so.

Q. Did anybody ask you what was the matter with you? A. No. 235

Q. Did you carry any papers with you? A. Yes, there was papers, records, I think. They sent them right with us.

Q. You had a little envelope, didn't you, with a string and that was fastened to your blouse or your shirt in some way, or your coat? A. I don't know how they did arrange it or whether they gave it to them, but I had an envelope anyway.

Q. Do you know whether this is the envelope that I show you now? Isn't this the envelope that you carried around with you from Italy to Casablanca (handing)? A. I wouldn't say for sure. It may have been. 236

Q. Does it look like it? A. Well, I wouldn't recall that for sure because it has been quite a while ago and I wouldn't pay much attention.

Q. These were the papers that were in—this is the envelope that contained the papers about your condition, isn't that so? A. That is probably the case record.

Q. And you carried records of your case to Miami, didn't you, from Casablanca, and then at the Jackson Hospital you turned those papers over to the doctors there, didn't you? A. They were left in the office.

Q. Yes. Now when you came from the Jackson Memorial Hospital to New York you carried the papers to New York with you, didn't you? A. We carried the x-rays. I wouldn't say whether we carried that envelope of papers. 237

Q. Don't you know whether you carried this envelope with you? A. I don't know for sure. I know we had the x-ray pictures anyway.

Q. The fact that this envelope of papers—which are in evidence—were part of this Stapleton Hospital records,

does that help you to remember that you were the one who
238 brought those papers to Stapleton with you? A. Well, we were instructed not to look at that just because they were official records.

Q. Wait a minute. The question I asked you, Mr. Warren, is whether or not the fact that this envelope and the papers were part of the Stapleton record, does that help you to remember that you are the one who brought them to Stapleton? A. Well, if they were in that envelope they were in it because I had another envelope with x-ray pictures and probably the other envelope was with them—no doubt it was.

239 Q. And you brought them to Stapleton? A. That is correct.

Q. And you say that although you carried these at least from the Jackson Memorial Hospital to Stapleton that you never opened the envelope and never looked to see what was in them? A. I did not.

Q. Did you ever open them between your base in Italy and Casablanca to see what was in them? A. No, we did not have any chance in most cases.

Q. Well, you were traveling by plane, weren't you? A. Yes, in a plane where we did not have room to turn over, in
240 stretchers.

Q. When you got to Casablanca and between Casablanca and Florida did you look at the papers? A. I believe we were instructed to turn them in to the medical officers upon arrival.

Q. At any time when you had these papers in your possession did you ever look them over? A. No, I did not.

Q. You knew that you were carrying medical records of your case, didn't you? A. That is right.

Q. Now I want to go back to the time that you entered this cafe or whatever it was, the dance hall; you and your two companions came in, if I understand your testimony, and selected a table at which you sat, is that right? A. I think we danced, the first thing we did when we came in. We probably, between music, went down and sat at a table later on. 241

Q. You said the first thing you did was to dance, is that what you say? A. I believe so—yes.

Q. How did you get partners to dance with? A. Well, they were just standing around there and if you couldn't talk to them you could smile at them.

Q. You mean there were some native women there and in some way or other you were able to persuade them, by glances or words, to dance with you? A. Occasionally one could talk English. 242

The Court: Or vice versa. Maybe they were the ones.

Q. All right, I will take it either way. That is so, isn't it? A. Yes.

Q. Now how many women were there standing around there? A. Oh, there wasn't an awful big crowd of either. There was probably eight or ten Americans around there and probably eight or ten Italian women. 243

Q. Now some time after the first dance or so you sat down at a table at which you consumed some wine, I think you said? A. Yes.

Q. And during the time that you were sitting at the table you said some of these women were sitting there with you? A. Yes, there was two or three.

Q. Did you buy any wine for the women?

244

Mr. Sardaro: If your Honor please, I object as not bearing upon the issue. I think he has gone far enough on this.

The Court: Overruled.

A. I don't believe they drank, when I come to think of it.

Q. So that you were with these women and danced with them and all that you and your companions had during the hour and a half or so before your accident, while you were in the room, was a 12-ounce bottle of wine? A. I think

245 they served it in small glasses there.

Q. All right. You had one small glass, you said? A. That is all I recall.

Q. And what about your companions? Is that all they had, too? A. Yes, that is all—they only drank when I did.

Q. Now after this hour and a half or so you got up and went to this room where the open window or open French doors were located; right? A. Yes.

Q. And you said yesterday—I am just bringing you up to this point so you will know what I am getting at—you approached the doors and looked out and then later stepped

246 on the ledge, is that right? A. I did not open the door.

Q. No, I am not suggesting you did. You said the doors were open. A. The doors were open practically across the whole side.

Q. All I want to do is get you out on the ledge. You did step out on the ledge, didn't you? A. Why certainly. If it is beyond the doors I would have had to.

Q. How far from the outside of the ledge did you step?

A. Well, I perhaps walked up within six inches to a foot of the edge. 247

Q. While you were standing there could you tell, without looking down, about how far it was below you before you reached the ground? A. What was that again?

Q. While you were standing on the ledge could you look down and see how far it was to the ground? A. Well, you could look down but it would only be a calculation of distance.

Q. When you looked down how much do you calculate it was below you? A. Well, that is very hard to tell. I figured about 15 feet to the first ledge and maybe 20 on. 248

Q. So that you had something in the neighborhood of a 30-foot drop below you there, is that right? A. That is only a calculation without measuring it. The distance can be deceiving.

Q. I am taking your calculation. Your best estimate is about 30 to 35, is that correct? A. That is correct.

Q. Now I think you said that while you were standing on the ledge you took a hold of a pipe or a bar of some sort and you leaned over, is that so? A. That is correct, if I understand—if I remember right.

Q. And what you say, as I understand it, is that as you were leaning over the edge—as I am standing on the platform here (indicating)—just as you were standing on the ledge—do you see my feet—about where you were standing with regard to the edge of the ledge? Look at that, will you, Mr. Warren, and see (indicating). A. Six inches to a foot, yes. 249

Q. Do you want to come down and show us how you found that space you had there?

The Court: He does not want to particularly, but
250 if you want him to do so and if there is no objection—but I do not see what difference it makes how careless he was.

Mr. Connor: That is the very point I am making. I am glad your Honor has picked it up.

Mr. Sardaro: May I ask your Honor if Mr. Connor is raising the issue, the fact that he looks over constitutes gross negligence on the part of the man?

Mr. Connor: Yes, that is the very question.

Mr. Sardaro: Then I object to the question.

The Court: If that is the purpose of the testimony
251 I will overrule the objection.

Mr. Warren, you get down there. You have had several ideas well planted now. You get down there and show just how you did this.

The Witness: Supposing I don't know, your Honor.

The Court: Then you will have to just say so.

The Witness: That is about all I can say is I don't know.

The Court: You walk all right now, don't you?

The Witness: Yes, all but going up and down
252 stairs.

The Court: You were pretty lucky to get out of that as you did.

The Witness: I suppose so. Supposing the rail was up here like that (indicating).

Q. Let me see what you have done and describe it so that we have it on the record. You extend your right hand out and somewhat above your head, is that right? A. The post would probably be close to the edge of the ledge.

The Court: This is hypothetical. What the libelant is doing is he is saying he does not remember exactly but he is trying to construct it as it must have happened. 253

Is that what you are trying to say?

The Witness: Yes. If I was about right up here (indicating) and grabbed the iron with the idea it was up there solid, and reach out to it, all at once it pulled loose, which would overbalance you and me, isn't that so?

The Court: I will make a statement on the record: The libelant is standing on the platform here with his toes about six inches from the edge, and as he testified a moment ago he held his right hand up to about the level with his head, or maybe two or three inches higher, and to the right of his body, indicating the he had grasped this rod coming down the outside of this building, a distance projecting an inch or two from the edge of the ledge, and then he bent forward, still retaining his right hand on the imaginary pipe, and indicated that that was how he fell. 254

Mr. Connor: Did your Honor observe the position of his head with relation to the edge of the ledge? 255

The Court: Yes, it was bent over.

Mr. Connor: Beyond it.

The Court: Beyond it looking down.

Mr. Connor: Thank you very much.

(Witness resumes the witness stand.)

Mr. Connor: I think that is all, your Honor.

The Court: Any redirect?

Redirect Examination by Mr. Sardaro:

256 Q. Just one question, Mr. Warren. How soon after the accident did you ask the boys in the jeep to give you a shot of morphine in the arm? A. Well, it probably was 15 or 20 minutes because I had to wait down there. Mr. Barr was the first one down and I had to wait for the boys to come around in a stretcher. They had to go down the beach a ways and come back.

Q. Do you recall who gave you that shot of morphine? A. It was one of the Army boys.

Q. He had it in a kit? A. Yes, in the first aid kits.

257 Q. As I understand it, the two men who were with you from the ship were the ship's carpenter? A. Yes.

Q. Do you remember his name? A. No, I don't.

Q. And another messman—do you remember his name? A. James Barr, yes.

Mr. Sardaro: I should like to read into the record from the answers to the interrogatories given by the respondent, the answer to question No. 5.

The question is: "State what entries are made in the official log or the deck log of the ship with respect

258 to the injury."

The answer says: "On October 30, 1944, at Naples, Italy, Walter K. Warren, messman, on this date injured himself in fall; sent to 118th Station Hospital, Naples, Italy, for treatment. Fell off a cliff while on shore. He stated that he had a drink. Ralph R. Albert, carpenter, and James M. Barr, messman, stated Warren was sober. Injury apparently accidental. Signed P. One White, Master."

Q. Mr. Warren, one more thing I think we should clarify. How long was this ledge that you stepped out on? A. Well, 259
it was quite a good length. It was probably to the nearest calculation about three or four sets of doors, with a post between or some setup of that type, and practically the whole back to the sea wall was opened up.

Q. Was there a roof overhead? A. Oh, yes.

Q. And these posts held up the roof? A. That is right.

Mr. Connor: I object to that. There is no such testimony.

The Court: You mean there was a roof just over over the ledge or a roof on top of the building? 260

The Witness: There was a roof over the building just like there would be here.

The Court: Yes. You did not mean there was a roof over the top of the ledge?

The Witness: No.

Q. But the roof did come over and cover the ledge?

The Court: Away up on top of the building.

Mr. Sardaro: Yes.

A. I believe the roof from the top of the building probably 261
would come out to the edge of the ledge at least because the ledge just seemed to be on the side of the building with doors opened up. It really wasn't a ledge in one sense of the word. Those buildings in Italy are constructed rather funny—

Q. Don't go into that.

262 The Court: Well, they are certainly funny if they do have railings with ledges like this, if people are made to go out of there. Didn't you see any railing there?

The Witness: There was no foot railing that you walked up to.

Q. Were there any other people on that ledge? A. Yes, there were people all around there. I judge there were five or six people around in that room and out to the edge, and there was probably some on each side of me. I really didn't 263 pay any attention because I was thinking about the scenery out across the bay.

Mr. Sardaro: That is all.
The Court: Is that all?

Recross Examination by Mr. Connor:

Q. Do I understand you to say now that there were some people standing to the right or to the left of you as you were standing on the edge? Is that your testimony? A. I don't know whether they were out to the ledge or whether they were casually drifting around the room.

264 Q. You weren't paying any attention? A. That is right. I do not know just where they were, that's all.

Mr. Connor: That is all.

(Witness excused.)

Mr. Sardaro: Libellant rests.
Mr. Connor: Respondent rests.

Colloquy

The Court: Off the record.

265

(Discussion off the record.)

Mr. Connor: Those records are here, your Honor.

The Court: Do they show anything?

Mr. Connor: Yes. I would like to call your Honor's attention to one page, the history page. I will put the whole record in.

The Court: You had better offer the whole record.

Mr. Connor: I will put the whole record in evidence.

266

(Marked Respondents' Exhibit B.)

The Court: These are the records of what hospital?

Mr. Connor: Detroit Marine Hospital. I just want to show counsel the signature on this page to which I wish to call your Honor's attention and if it will be conceded that that is his signature I will read that page to your Honor.

The Court: Get your concession in first and then show it to me.

267

(Mr. Connor speaks with Mr. Sardaro off the record.)

The Court: I do not think you need to read it into the record.

Mr. Sardaro: I will concede it is his signature.

268 Mr. Connor: That page, if your Honor plea
the purpose of the record, is entitled "Clinica
ord" (handing to Court).

The Court: Do you have any comments up
contents of this page?

Mr. Connor: Yes. It presents a totally di
history than was testified to by the libelant.

The Court: Just as the log did.

Mr. Connor: Yes.

(Discussion re briefs.)

269 The Court: You have until four o'clock tom
to submit any further memoranda.

270

Libelant's Exhibit 1

Form 1946-T
Federal Security Agency
Public Health Service
(June 1941)

ABSTRACT FROM CLINICAL RECORD

Name Walter K. Warren Occupation Merchant Seaman—Steward

Age 34 years, Last Vessel SS ANNA HOWARD SHAW

Furnished hospital care from February 27, 1945, to May 29, 1945

Furnished outpatient care from None

Diagnosis Fracture medial malleolus right leg with mal-union

CONDITION OF PATIENT UPON ADMISSION

On October 30, 1944 patient stated he fell from a sea wall in Italy, a distance of about thirty feet fracturing his right lower leg. A cast was applied and five and one half weeks later it was removed. After removal of cast patient noticed that his ankle became tender after walking and there was limitation of motility.

Physical examination revealed a laterally displaced fibula with swelling and limitation of motion of the right ankle. X-ray examination revealed mal-union. On March 2, 1945 an open reduction was performed.

Libelant's Exhibit 1

CONDITION OF PATIENT ON 5-29-45
(Date)

Improved. Advised to confine activities to light duty only for about one month after which it was anticipated that he would be fit for regular duty.

J. B. RYON
Surgeon, United States Public Health Service, in Charge.
J. B. Ryon, Senior Surgeon USPHS
Clinical Director

[Impression,
Service
Seal]

U. S. Marine Hospital
(Station)

Detroit, 15, Michigan
(Address)

September 12, 1945
JBR:dcs

271

Libelant's Exhibit 1

Abstract of Detroit Hospital

~~(Omitted pursuant to stipulation)~~

272

273

Libelant's Exhibit 2

274 Claim filed Pursuant to Public Law 17
(Omnibus Bill H. R. 133)

In the Matter of the Claim of

WALTER K. WARREN

Certificate of Identification #482857; Residing at 325 Howe Street, Lansing, Michigan; born in the United States of America on August 2nd, 1910,

275 —against—

UNITED STATES OF AMERICA and AMERICAN SOUTH AFRICAN LINES, INC.

SIRS:

PLEASE TAKE NOTICE that the above named claimant, by his attorney, SAUL SPERLING, pursuant to rules and regulations governing officers and crew members in such cases made and provided, does hereby claim and demand from
276 the United States of America, through the American South African Lines, Inc. the sum of Three thousand ($3,000) dollars and no/100 cents, as and for overtime, wages to October 30th, 1944 and thence to the end of the voyage, repatriation bonus, maintenance and cure, as and for damages sustained by him by reason of injuries which he sustained on October 30th, 1944 at about 4 P.M. while employed as messman aboard the S. S. "ANNA HOWARD SHAW".

Libelant's Exhibit 2

Claimant signed foreign Articles aboard the S. S. "ANNA HOWARD SHAW" at Philadelphia on or about June 1st, 1944. 277

Upon information and belief that said vessel was owned by the United States of America and was operated by the American South African Lines, Inc. as agent and for the account of the War Shipping Administration.

While said vessel was lying at Magnolia, Italy, on October 30th, 1944 claimant was granted shore leave and proceeded to visit a dance hall. That upon his arrival there he walked out on the balcony and was caused to fall therefrom when the railing thereof collapsed necessitating his immediate removal to the 118th Evacuation Hospital at Naples where he was confined until November 17th, 1944. 278 He was eventually returned to New York City for treatment at the United States Marine Hospital at Stapleton, Staten Island, where he was confined until December 21st, 1944.

On December 22nd, 1944 claimant made due demand of the American South African Lines, Inc. for payment of his wages which he had earned up to October 30th, 1944 plus his overtime, wages he would have earned had he been permitted to complete the voyage, his repatriation bonus and maintenance and cure. The said company has refused to entertain the same. 279

YOU WILL PLEASE TAKE FURTHER NOTICE that in the event this claim is declined, a Court action for the sum of Three thousand and no/100 ($3,000) dollars will be instituted herein.

Libelant's Exhibit 2

Dated: New York, N. Y., December 22nd, 1944.

280

Yours, etc.,

WALTER K. WARREN

SAUL SPERLING
Attorney for Claimant
Office & P. O. Address
61 Whitehall Street
Borough of Manhattan
City of New York

281

To:

CHIEF ADJUSTER
WAR SHIPPING ADMINISTRATION

AMERICAN SOUTH AFRICAN LINES, INC.
26 Beaver Street
New York, N. Y.

282

Libelant's Exhibit 3

Form 1971M
Federal Security Agency
U. S. Public Health Service
(September 1939)

CERTIFICATE OF HOSPITAL AND OUTPATIENT TREATMENT

U. S. Marine Hospital Staten Island, N. Y.

Date Jan. 20, 1945.

1. Name of patient Walker K. Warren, Messman, SS Anna H. Shaw.

2. Brief abstract of patient's statement as to how and when disability was incurred On Oct. 30, 1944, at Naples, Italy, he sustained a fracture of the distal end of the right tibia and fibula when he fell about 50 feet, landing a pile of debris. His foot was caught and twisted between two large stones. He leaned against a guard rail, which broke, allowing him to fall to the debris below.

3. Diagnosis Osteomyelitis, old, of the shaft of the tibia, draining

4. Complications and operations Application of walking caliper to leg.

5. Date of admission to hospital Dec. 8, 1944

6. Date of discharge from hospital Dec. 21, 1944.

7. Date of admission to outpatient department .....

Libelant's Exhibit 3

8. Date of discharge from outpatient department .....

9. Condition on discharge Improved.

10. Number of days completely disabled Hospital period and for 6 weeks thereafter, following which he is to apply for outpatient treatment.

11. Number of days partially disabled .....

12. Prognosis .....

VERNAM T. DAVIS
Vernam T. Davis, Surgeon, USPHS
Clinical Director
(Title)

By direction of the Medical Officer in Charge.

[SEAL]

N. B.—This certificate is furnished to the patient to enable him to collect insurance benefits that may be due him and is to take the place of the certificate required by the insurance companies from private physicians who attend persons insured. It is compiled from the official records of the hospital and is signed by a medical officer of the United States Government over his official title.

Libelant's Exhibit 3

Clinical Record of Staten Island Hospital

283

Respondents' Exhibit A

Hospital Record— U. S. Memorial Hospital at Stapelton

Respondents' Exhibit A1

Statement Part of Exhibit A

284

Respondents' Exhibit B

Record of Detroit Memorial Hospital

285

UNITED STATES DISTRICT COURT

286 SOUTHERN DISTRICT OF NEW YORK

Ad. 135-171

[SAME TITLE]

APPEARANCES:

SAUL SPERLING, ESQ.
287 Proctor for Libellant
(Xavier N. Sardaro, Advocate)

JOHN F. X. McGOHEY, ESQ.
United States Attorney
Proctor for Respondent
United States of America
(By Messrs. Kirlin, Campbell, Hickox & Keating, Advocates for said respondent United States of America)

288 MESSRS. KIRLIN, CAMPBELL, HICKOX & KEATING
Proctors for Respondent
American South African Line, Inc.
(Water X. Connor, Advocate)

Opinion

MEDINA, *D. J.*:

289

Libellant, a merchant seaman, was injured while a member of the crew of the S. S. "Anna Howard Shaw," although not aboard [redacted] vessel at the time. In this proceeding in personam he claims maintenance and cure from the United States, the owner of the vessel, and the American South African Line, Inc., which was acting under the customary form of general agency agreement.

§2 of the Suits in Admiralty Act, 46 U. S. C. A. §742 provides:

> "In cases where if such vessel were privately owned 290
> or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against any corporation mentioned in section 741 of this title, as the case may be, provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their
> principal place of business in the United States, or 291
> in which the vessel or cargo charged with liability is found. • • • ."

At the time of the filing of the libel, the vessel was not within the waters of the United States or any of its territories. At all times libellant was a resident of Lansing, Michigan. It was stipulated that during the pendency of

this proceeding the vessel was for a time within the territorial waters of the United States and within the Southern District of New York. The respondent United States pleaded both lack of jurisdiction and improper venue.

It may be that the language of the statute can be so construed as to require a holding that the Court was without jurisdiction. *Blamberg Brothers* v. *United States*, 260 U. S. 452 (1923); *Carroll* v. *United States*, 133 F. 2d 690 (C. C. A. 2 1943); *Abbott* v. *United States*, 61 F. Supp. 989 (S. D. N. Y. 1945); *Untersinger* v. *United States*, 1947 A. M. C. 1348 (S. D. N. Y.); *Barnes* v. *United States*, 67 F. Supp. 571 (S. D. N. Y. 1946); *Sawyer* v. *United States*, 66 F. Supp. 271 (S. D. N. Y. 1946). On the other hand, the basic purposes of the Suits in Admiralty Act and the similarity of the language of §2 to the pattern of other provisions of law pertaining to venue would seem to indicate a lack of intention on the part of the Congress to make the presence of the vessel in the waters of the United States at the time of the filing of the libel an indispensable prerequisite to jurisdiction. Nor does it seem possible to reconcile a holding of lack of jurisdiction with judicial determinations that the Court might proceed to decree where the vessel has been torpedoed or where, for other good and sufficient reasons, the presence of the vessel could not be had or the point had been waived. *Eastern Transportation Co.* v. *United States*, 272 U. S. 675 (1927); *Kungl ig Jarnvagsstyrelsen* v. *United States*, 19 F. 2d 761 (C. C. A. 2 1927); *McGhee* v. *United States*, 62 F. Supp. 224 (S. D. N. Y. 1945), *rev'd on other grounds*, 154 F. 2d 101 (C. C. A. 2 1946); *Hong* v. *United States*, 59 F. Supp. 794 (S. D. N. Y. 1944). No stipulation or act of parties or adventitious circumstance arising out of war conditions could suffice to

confer upon the Court a jurisdiction over subject matter which otherwise would not exist. But this is by the way. 295

It is at least clear that the objection to venue is well taken; and the libel against the United States must accordingly be dismissed. *Abbott* v. *United States*, 61 F. Supp. 989 (S. D. N. Y. 1945); *Radinciuc* v. *United States*, 1947 A. M. C. 951 (E. D. Pa. 1947). Apparently libellant does not contend otherwise; and no application has been made to transfer the cause to any other district.

Respondent American South African Line, Inc. may still be liable, despite the dismissal of the libel as against the United States. *Carroll* v. *United States*, 133 F. 2d 690 (C. C. A. 2 1943). But it asserts that it is not liable for 296 maintenance and cure because the relationship of employer and employee did not exist between it and libellant.

American South African Line, Inc. was the general agent, having certain powers over and duties toward the S. S. "Anna Howard Shaw," appointed under a General Agent Service Agreement with the War Shipping Administration, similar to that cited and interpreted in *Hust* v. *Moore-McCormack Lines, Inc.*, 328 U. S. 707 (1946). Under the terms of that agreement, the general agent procures members of the crew, and makes them available to the ship's master, and in this case American South African Line, Inc. 297 was responsible for the hiring of libellant. The *Hust* case held that, for purposes of suit under the Jones Act, 46 U. S. C. A. §688, the general agent was the employer of a seaman injured aboard ship. In spite of the assertion by the Department of Justice in a letter, a copy of which was submitted to the Court, that the general agent "is a mere ship's husband looking after the accounting and certain other shoreside operations of the vessel," no argument

is any longer possible, after the *Hust* case, that the general
298 agent is not, at least for some purposes, an "employer."

The question is whether the general agent is an employer for the purposes of liability for maintenance and cure. The reasoning of the *Hust* case would seem persuasive that it is. Respondent, however, attempts to distinguish that case because it was a suit for indemnity under the Jones Act, whereas this is not. True, respondent does not deny that a general agent may be liable both for indemnity under the Jones Act and for maintenance and cure, *Lewis* v. *United States Navigation Co.*, 57 F. Supp. 652 (S. D. N. Y. 1944), but it asserts that a suit for maintenance and cure against
299 a general agent cannot be maintained independently of a suit under the Jones Act.

I cannot make this distinction. If a general agent is an employer for the purposes of liability in tort under the Jones Act, it does not seem far-fetched to consider him an employer for the purposes of liability for maintenance and cure, that pervasive incident of the maritime contract, *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367, 371 (1932), antedating the Jones Act by hundreds of years. *The Osceola*, 189 U. S. 158, 169-175 (1903). It would be incongruous to say that the Jones Act has by implication so weakened
300 it as to make it incapable of independent suit. 1 Benedict, Admiralty 258 (6th ed. 1940). There are authorities for this view, both in the Federal, *Broadbent* v. *United States*, 1947 A. M. C. 749 (E. D. Pa. 1947), and State courts. *Moss* v. *Alaska Packers Association*, 70 Cal. App. 2d 857, 160 P. 2d 224 (1945); *Martinez* v. *Marine Transport Line*, 1947 A. M. C. 529 (N. Y. City Municipal Court 1947).

Nor does *Caldarola* v. *Eckert*, 332 U. S. 155 (1947), require a different conclusion. There a stevedore was injured while working aboard a vessel with respect to which

an agent was functioning under the usual General Agent Service Agreement. The general agent had nothing to do with his being hired, as he was the employee of a stevedoring concern under an independent contract with the government. The Supreme Court held that this agreement did not impose upon the agent "duties of care to third persons, more particularly to a stevedore under employment of a concern unloading the vessel pursuant to a contract with the United States." (332 U. S. at 159). Libellant here is not a business invitee, a third person, but a seaman procured by the general agent under the Service Agreement. He is more like Hust than Caldarola. It would not impose an unusual burden upon general agents to require them to make payments for maintenance and cure, for it has apparently been the practise for them to do so. See Legal Bulletin No. 53, War Shipping Administration, February 28, 1945. I find that American South African Line, Inc. is the libellant's employer for the purposes of a claim for maintenance and cure. Now to the merits.

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Libellant was a messman aboard the S. S. "Anna Howard Shaw." On October 30, 1944, while the vessel was in the Bay of Naples, Italy, libellant left on shore leave. In company with the ship's carpenter and another messman, he went sightseeing. They came to the waterfront town of Bagnoli (referred to by libellant as Magnolia). The group stopped at various stores and at one such place they bought a small bottle of wine which they divided among them. About three miles down the shore from where they had landed from a motor lifeboat, they stopped at a dance hall and stayed an hour and a half or so. Libellant says he was dancing most of the time, and drank only one additional glass of wine.

303

After a time libellant entered another room and
304 approached a large window overlooking the sea, and he says the sight of the waves breaking upon the rocks some thirty-five feet below intrigued him. The french doors of this window extended to the level of the floor and he observed a sort of wholly unprotected ledge or balcony, which extended out from the building some two and a half or three feet. There was no railing of any sort and the slightest misstep or unsteadiness was almost sure to precipitate libellant. In any event, it was a perilous undertaking to go out upon this balcony and one even more perilous to lean over the edge to get a better view of the rocks and
305 waves immediately below. But this is what libellant did. When he came to a position where the toes of his shoes were six inches from the edge, he leaned over, at the same time taking hold of a rod about one-half inch in circumference, which was apparently affixed to the building to his right. He merely took a casual glance at this rod and makes no claim to have done more. It looked like a "lightning arrester or something of that type." Whether the fastenings such as they were had been weakened by bombs and shell fire, which had otherwise marked the buildings in the vicinity to some extent, does not appear. Nor
306 does the testimony disclose the purpose which this rod served. As he grasped it, and leaned over the edge, the rod came off and libellant lost his balance and fell. A similar ledge or balcony on one of the windows below broke his fall or he would have sustained injuries far more serious than a broken leg. This fall and its consequences are the basis for his suit for maintenance and cure.

A seaman, injured in the service of his ship, is entitled to maintenance at its expense. I Benedict, Admiralty §83

(6th ed. 1940). "Only some wilful misbehavior or deliberate act of indiscretion suffices to deprive" him of maintenance, the "traditional instances" being "venereal disease and injuries received as a result of intoxication." Rutledge, *J.*, in *Aguilar* v. *Standard Oil Co.*, 318 U. S. 724, 731 (1943). "Gross" negligence also deprives him of maintenance, *Reed* v. *Canfield*, 20 Fed. Cas. 426, No. 11,641 (C. C. D. Mass. 1832); *Jackson* v. *Pittsburgh S. S. Co.*, 131 F. 2d 668 (C. C. A. 6 1942). I shall first consider whether libellant was in the service of the ship when he was injured, then whether he was drunk, and whether he was "grossly" negligent. 307

When libellant was injured, he was over three miles from the ship, was not doing any work for the ship, but was where he was for his own pleasure. He claims he was "in the service of the ship," within the meaning the *Aguilar* case gave to that term. 308

That decision allowed maintenance and cure to seamen who were injured some distance, but no more than half a mile, from their ships, one while going on, and the other returning from, shore leave. In delivering the opinion of the Court, Justice Rutledge considered at length the policy bases for maintenance and cure and the necessity of extending its protection to sailors ashore. "Relaxation beyond the confines of the ship is necessary if the work is to go on. * * * shore leave is an elemental necessity in the sailing of ships * * * not merely a personal diversion. * * * it is the ship's business which subjects the seaman to the risks attending hours of relaxation in strange surroundings. Accordingly, it is but reasonable that the business extend the same protections against injury from them as it gives for other risks of the employment." 318 U. S. at 734. The 309

language of the opinion would justify a holding here that
310 libellant was in the service of his ship. Indeed, it has been suggested that the rationale of the *Aguilar* case "would seem to cover all injuries incurred without misconduct while on shore leave." Note, The Supreme Court of the United States during the October Term, 1942: I, 43 Columbia Law Review 837, 864, n. 162 (1943).

The respondent, though, points out that all the *Aguilar* case decided was that seamen injured while on their way to or from shore leave are entitled to maintenance; that only in dictum did Justice Rutledge extend that liability
311 beyond the facts before the court. It insists that it would be improper to subject the shipowner to liability for any any every injury his seamen received on shore leave, except those occasioned by their serious fault. Every drunken brawl in every waterfront dive would put the shipowner to expense as long as the injured seaman maintained he was an innocent bystander and the shipowner could not prove the contrary. The shipowner would in effect become an insurer of the safety of his men, on and off the ship, subject to his chance of establishing misconduct.

If the language of the Supreme Court is to be taken as anything more than sociological disquisition, courts must
312 regard it as pointing the way to a freer allowance of maintenance, even in situations less appealing than those then before the Court. It would be futile for courts to undertake to say how necessary shore leave was under the circumstances of a particular case; and the reasoning of the Supreme Court must be disregarded if it is to be held that maintenance must be granted to a seaman about to go on leave, but withheld from one who is actually enjoying that recreation which is said to be the "ship's business," 318 U. S. at 734, as well as his.

Courts have on the whole given the *Aguilar* case a liberal
nterpretation. In *Muise* v. *Abbott*, 60 F. Supp. 561 (D. 313
Mass. 1945), the libellant, returning from shore leave, fell
nto a pit an unspecified distance from his ship. Mainten-
ance was allowed. In *Nowery* v. *Smith*, 69 F. Supp. 755
E. D. Pa. 1946), *aff'd*, 1947 A. M. C. 756 (C. C. A. 3 1947),
he libellant while in a barroom on leave was injured by
another member of the crew. Allowing maintenance, the
Court said, 69 F. Supp. at 757, " * * * logic compels the
conclusion that the seaman should also be considered on
the shipowner's business' while he is actually enjoying his
shore leave." In *Moss* v. *Alaska Packers Ass'n.*, 70 Cal.
App. 2d 857, 160 P. 2d 224 (1945), the plaintiff, on shore 314
eave in Tasmania, was hit over the head in a barroom.
Maintenance was allowed. In *Stanley* v. *Weyerhaeuser S. S.*
Co., 1947 A. M. C. 411 (Super. Ct. San Francisco 1947),
he plaintiff had been injured seventeen miles from his
hip while on leave. The Court set aside a release he had
executed to the shipowner, because the latter's representa-
ive had not explained to him his rights under the Jones
Act and the *Aguilar* case.

This liberal interpretation seems to prevail in the Second
Circuit. In *Kyriakos* v. *Goulandris*, 151 F. 2d 132 (C. C. A.
2 1945), a crew member assaulted the libellant on leave 315
near the ship as a result of a shipboard disagreement.
The Court held maintenance might be awarded, the *Aguilar*
case being an alternative ground for its holding. In a
later stage of that case, *Kyriakos* v. *Polemis*, 63 F. Supp.
19 (S. D. N. Y. 1945), Judge Bondy allowed maintenance,
citing the *Aguilar* case. In *Dasher* v. *United States*, 59 F.
Supp. 742 (S. D. N. Y. 1945), the libellant had been injured
on shore leave in a Mediterranean port. Judge Goddard

allowed maintenance. Judge Leibell cited the *Aguilar* case
316 and *Kyriakos* v. *Goulandris*, in allowing maintenance in *Sullivan* v. *United States*, 1947 A. M. C. 426 (S. D. N. Y. 1947), where the libellant had been set upon and robbed returning from shore leave.

A few cases, however, interpret the *Aguilar* case more strictly. In *Siclana* v. *United States*, 56 F. Supp. 442 (S. D. N. Y. 1944), the libellant, returning from shore leave, had been attacked an unspecified distance from his ship. Judge Hulbert sustained exceptions to the libel, id. at 443: "* * * the locality of the attack is not identified. Its proximity
317 to the place of employment (the ship) is not disclosed and it may have been so far remote that his employer may not have been under any duty of responsibility whatever." In *Smith* v. *United States*, 1947 A. M. C. 481 (E. D. Va. 1946), the libellant on shore leave turned his ankle in the driveway of a friend's house over seven miles distant from the ship. The Court, limiting the *Aguilar* case to its facts, held maintenance could not be allowed to a libellant injured in familiar surroundings. The same rationale underlay *Taylor* v. *United Fruit Co.*, 1947 A. M. C. 1297 (N. Y. Sup. Ct. App. Term 1947), where the plaintiff, at home on leave, stepped out to buy a newspaper and was injured on
318 the way back. The Court reversed a judgment for maintenance.

If there is a place where the shipowner's liability for maintenance thins out and disappears, I do not think surveyors' instruments may be used to find it. The policy considerations protecting seamen in transit to and from shore leave do not automatically vanish throughout the course of the leave itself. Moreover, the reasoning which underlies the conclusions arrived at in the *Aguilar* case

ems a safer guide than the exact circumstances of the
rticular case or chance phrases to be found in the text 319
the opinion. If the logical results of this reasoning are
be whittled down by fine distinctions, it seems that the
es of demarcation should be drawn by the Supreme
ourt and not at nisi prius. *Delaware & Hudson Co.* v.
ommissioner of Internal Revenue, 65 F. 2d 292, 293 (C. C.
2 1933); *Farmers' Loan & Trust Co.* v. *United States*,
F. 2d 688, 689 (S. D. N. Y. 1925); *Cameron* v. *United*
ates, 250 Fed. 943, 947 (C. C. A. 9 1918); *Bakewell* v.
nited States, 110 F. 2d 564 (C .C. A. 8 1940); *Tucker* v.
orton, 49 F. Supp. 483, 484 (E. D. Pa. 1943). In any
ent, by any test reasonably consistent with the opinion 320
Justice Rutledge the place where Warren fell was not
o far from the ship and the surroundings were far from
miliar. I hold the libellant was injured in the service of
s ship.

The evidence as to libellant's intoxication is conflicting.
e says he had had only about a third of a small bottle of
ne and one glass more before he was injured. The record
the hospital to which he was taken after his injury, how-
er, contains the entry "acute alcoholism." Libellant says
may have presented a stupefied appearance when he
ached the hospital, because he had previously been given 321
orphine; therefore the hospital doctors may have thought
m drunk. The ship's log is interesting but inconclusive.
reads:

> "On October 30, 1944, at Naples, Italy, Walter K. Warren, messman, on this date injured himself in fall; sent to 118th Station Hospital, Naples, Italy, for treatment. Fell off a cliff while on shore. He stated that he had a drink. Ralph R. Albert, car-

322 penter, and James M. Barr, messman, stated Warren was sober. Injury apparently accidental."

I am inclined to think libellant was less sober than he says he was, but I find he was not so under the influence of liquor as to be barred from recovery.

Respondent asserts libellant's own "gross" negligence was the cause of his injury. Heretofore the question of "gross" negligence appears to have shaded somewhat into the question whether the injured seaman was in the service of the ship. *Barlow* v. *Pan Atlantic S. S. Corp.*, 101 F. 2d 697, 698, 699 (C. C. A. 2 1939); *Jackson* v. *Pittsburgh S. S. Co.*, 131 F. 2d 668 (C. C. A. 6 1942); *The Ben Flint*, 3 Fed. Cas. No. 1,299, at 185 (D. Wisc. 1867); *The Quaker City*, 1 F. Supp. 840, 841, 842 (E. D. Pa. 1931). But since the *Aguilar* case tends to take the subleties out of the question of injury in the ship's service, the question of "gross" negligence will probably bulk larger as an independent defense to maintenance actions from now on. While it may be, as contended by respondents, that conduct which would be adjudged "grossly" negligent away from the ship might be viewed differently when on the ship itself, it is likely that the difference is more apparent than real.

323

324 Attempts to classify the various graduations of negligence have largely proved elusive. Generalities are likely to lead to error in particular situations. If maintenance is to be denied here, the element of wilfulness or something akin to it must be found in one form or another. This being true it is hard to find any definition of "gross" negligence which will fit into the pattern of the maintenance cases other than that of a reckless disregard of safety. Restatement, Torts §§500, 502 (1934).

Opinion

That libellant here was negligent seems sufficiently plain. Did he act in reckless disregard of safety? Perhaps it could be said that he did but for the one precaution of grasping the rod which he thought was securely fastened to the building. Accordingly, as he exercised some care, it can hardly be found that his act was "grossly" negligent in the sense of being reckless. Wilfulness in any real sense is contradicted by all the attendant circumstances as well as by libellant's testimony. The claim for maintenance is allowed in the amount of Six Hundred Forty-four and 16/100ths Dollars ($644.16) and a decree will be entered in favor of libellant for that sum together with costs against respondent American South African Line, Inc. As to respondent United States the libel is dismissed.

325

326

Submit findings.

HAROLD R. MEDINA
U. S. D. J.

Dated: December 8th, 1947.

327

Notice of Motion

UNITED STATES DISTRICT COURT

328 SOUTHERN DISTRICT OF NEW YORK

A 135-171

[SAME TITLE]

SIR:

PLEASE TAKE NOTICE that upon the annexed affidavit of
329 Walter X. Connor, sworn to the 15th day of December 1947, and on all the pleadings and proceedings had herein, the undersigned will move this Court at a stated term for the hearing of motions at the United States Court House, Foley Square, Borough of Manhattan, City and State of New York on the 23rd day of December 1947, at 10:30 o'clock in the forenoon or as soon thereafter as counsel can be heard for an order granting a rehearing of the above entitled case, and on rehearing, for an order dismissing the libel against respondent, American South African Line, Inc., and in the alternative reducing the amount awarded libelant, and for such other, further and
330 different relief as to the Court may seem just and proper.

Dated, New York, December 15, 1947.

Notice of Motion

Yours, etc.,

331

JOHN F. X. MCGOHEY,
United States Attorney,
Proctor for U. S. A.

KIRLIN CAMPBELL HICKOX & KEATING
of counsel to said respondent and
Proctors for respondent, American South African Line, Inc.,
Office and Post Office Address,
120 Broadway,
Borough of Manhattan, 332
City of New York 5.

To:

SAUL SPERLING, ESQ.,
Proctor for Libelant,
61 Whitehall Street,
New York, N. Y.

333

Affidavit of Walter X. Connor

UNITED STATES DISTRICT COURT

334

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

WALTER X. CONNOR, being duly sworn, deposes and says:

335 I am an attorney at law, associated with the firm of Kirlin, Campbell, Hickox & Keating, of counsel to proctor for the respondent, United States of America and proctors for the respondent, American South African Line, Inc., and I am familiar with all the pleadings and proceedings heretofore had herein.

On or about December 8th after the trial of this case before Honorable Harold R. Medina on October 29th, 1947, Judge Medina handed down his decision awarding maintenance in the sum of $644.16 against the respondent, American South African Line. Shortly prior thereto, the Circuit Court of Appeals for the Second Circuit handed down
336 a decision in *Shilman* v. *United States of America and Grace Line, Inc.*, in which the Circuit Court of Appeals held that the general agent was not liable to seamen for wages or other contractual obligations. Moreover, it analyzed the decisions in *Hust* v. *Moore-McCormack and Calderola* v. *Thor Eckert,* and concluded that, at least, in cases not involving the Jones Act, the general agent was not suable as employer.

Furthermore, the decision awarded an amount of maintenance which I believe is in excess of what Warren should receive. It is not clear from the opinion, how the sum awarded was reached. It was not anticipated at the termination of the trial that there would be any award in any amount to libelant. The exact amount due was therefore not argued by respondents. 337

WHEREFORE, I respectfully pray that a rehearing be granted.

WALTER X. CONNOR

(Sworn to December 15, 1947.) 338

339

Memorandum on Rehearing

UNITED STATES DISTRICT COURT

340 SOUTHERN DISTRICT OF NEW YORK

Ad. 135-171

[SAME TITLE]

APPEARANCES:

341 SAUL SPERLING, ESQ.
Proctor for Libellant
(Xavier N. Sardaro, Advocate)

JOHN F. X. MCGOHEY, ESQ.
United States Attorney
Proctor for Respondent
United States of America
(By Messrs. Kirlin, Campbell, Hickox & Keating, Advocates for said respondent United States of America)

342 MESSRS. KIRLIN, CAMPBELL, HICKOX & KEATING
Proctors for Respondent
American South African Line, Inc.
(Walter X. Connor, Advocate)

Memorandum on Rehearing

MEDINA, *D. J.*

343

In *Shilman* v. *United States of America War Shipping Administration and Grace Line, Inc.*, decided December 4, 1947, the Circuit Court of Appeals did not decide that a seaman may not recover maintenance and cure against a steamship company acting under a General Agency Agreement. The contention that the Circuit Court of Appeals would so hold, should such a case come before it, is based upon the statement at the end of the opinion that neither in the *Hust* case nor in the *Caldarola* case was it held that the agent was an employer to such an extent as to give rise to liability for wages "or other contractual obli- 344
gations." The subject is a prickly one. The right to maintenance and cure traces its origin to a time when such things as "contractual obligations" in the modern sense of the term could scarcely be said to exist. This right is inherent in the status of the seaman. It is by no means clear that a right to maintenance and cure may not arise even prior to the signing of Shipping Articles, Comment, The Tangled Seine: A Survey of Maritime Personal Injury Remedies, 57 Yale Law Journal 243, 248 n. 19 (1947), citing *Martinez* v. *Marine Transport Line*, 1947 A. M. C. 529 (N. Y. City Mun. Ct.), rev'd on other grounds, 119 N. Y. L. J. 787 (Sup. Ct. App. Term Mar. 2, 1948); 345
and a scrutiny of the long and interesting history of this curious remedy of the maritime law would seem to lead to the conclusion that it partakes as much of the character of tort as contract and perhaps hangs suspended as it were between the two. In any event, my holding that American South African Line, Inc. is libellant's employer for the purposes of a claim for maintenance and cure stems from

the *Hust* case. With each new reading of the opinion of
346 the Court I am the more convinced that the reasoning behind that decision applies just as forcibly to maintenance and cure as to the remedy provided by the Jones Act. While the *Hust* case stands, it seems to me I have no alternative than to stick to my guns.

Respondent American South African Line, Inc. now urges for the first time that the Clarification Act is a bar to libellant's recovery. But by the weight of authority and the weight of reason too the Clarification Act will not bear the construction which respondent would give it with respect to rights arising after the date it took effect. *Ben-*
347 *nett* v. *Wilmore S. S. Corp.*, 69 F. Supp. 427 (S. D. Tex. 1946); *Moss* v. *Alaska Packers Association*, 70 Cal. App. 2d 857, 160 P. 2d 224, 1945 A. M. C. 493 (1945); *Gay* v. *Pope & Talbot*, 47 N. Y. S. 2d 16, 1944 A. M. C. 855 (Sup. Ct. 1944); *Cohen* v. *American Petroleum Transport Corp.*, 1947 A. M. C. 336 (N. Y. City Court 1947); *Fink* v. *Shepard Steamship Co.*, 1946 A. M. C. 1333 (Or. Cir. Ct. 1946). Contra: *Gaynor* v. *Aguilines, Inc.*, 1948 A. M. C. 81 (E. D. Pa. 1947); cf. *United States* v. *Lubinski*, 153 F. 2d 1013 (C. C. A. 9th 1946).

Motion denied.

Submit findings.
348

HAROLD R. MEDINA
U. S. D. J.

March 4, 1948.

Findings of Fact and Conclusions of Law

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Ad. 135-171

[SAME TITLE]

FINDINGS OF FACT

1. Libelant was employed on board the S. S. "Anna Howard Shaw" as a messman. 350

2. The S. S. "Anna Howard Shaw" was owned by the United States of America.

3. The American South African Line, Inc., was acting as general agent for the United States of America with regard to the S. S. "Anna Howard Shaw" under customary form of general agency agreement, 46 Code Fed. Regs. §306.44 (Cum. Supp. 1944).

4. At the time of the filing of the libel, the S. S. "Anna Howard Shaw" was not within the waters of the United States nor any of its territorial waters. 351

5. During the pendency of this proceeding the S. S. "Anna Howard Shaw" was for a time within the territorial waters of the United States and within the Southern District of New York.

6. At all times libellant was a resident of Lansing, Michigan.

7. When libellant first reported to work aboard the S. S.
352 "Anna Howard Shaw," he knew he was going to work for a company by the name of American South African Line, Inc.

8. On October 30th, 1944 while the S. S. "Anna Howard Shaw" was in the Bay of Naples, Italy, libellant left on shore leave in the company of the ship's carpenter and another messman.

9. Libellant and his companions came to the waterfront town of Bagnoli whose buildings showed evidences of hav-
353 ing been in an area of active war.

10. About three (3) miles down the shore from the place where they had landed in the motorboat from the S. S. "Anna Howard Shaw," they entered a dance hall and stayed for an hour and a half or so.

11. After dancing with some native women whom libellant met in the dance hall, he entered an adjoining room in the dance hall which overlooked the sea. There were French doors in this room which reached to the level of the floor outside of which was a ledge approximately 2 1/2 to 3 feet
354 in width, not protected by any railing.

12. Libellant went out on this ledge to view the waves and rocks below. The ledge was not protected by any railing, and there was a 35-foot drop from it to the rocks below.

13. When libellant came to a position where the toes of his shoes were approximately 6 inches from the edge, he

leaned over so that his head protruded slightly beyond the edge of the ledge and at the same time he took hold of a 355
metal rod which was about 1 1/2 inches in circumference and which was apparently affixed to the building to his right.

14. Before taking hold of this rod he glanced at it and concluded that it was a lightening arrester or something like that.

15. As libellant was in the position described in Finding 13, the rod mentioned in Findings 13 and 14 broke loose or came off and libellant lost his balance and fell 356
below.

16. At the time libellant fell he was not performing any work for the vessel and was in fact more than three miles from it on authorized shore leave and actually enjoying his own pleasure.

17. I find that libellant was not so under the influence of alcohol as to be barred from recovery of maintenance.

18. I find that libellant did not act in reckless disregard of his own safety nor was he grossly negligent. 357

CONCLUSIONS OF LAW

1. The libellant having failed to bring his action against respondent, United States of America, in the proper district, it is dismissed for improper venue as against respondent, United States of America.

358 2. Libellant sustained injuries while in the service of his ship.

3. Respondent, American South African Line, Inc., was libellant's employer for the purposes of a claim for maintenance and cure.

4. Libellant was neither so negligent nor so intoxicated as to be barred from recovering an allowance for maintenance and cure.

359 5. Libellant is entitled to a decree against respondent, American South African Line, Inc., in the sum of Six Hundred Forty-Four and 16/100 Dollars ($644.16) on account of maintenance and cure expenses and wages to the end of the voyage.

Dated: New York, N. Y. April 29, 1948.

HAROLD R. MEDINA,
United States District Judge.

360

Final Decree

At a stated term of the United States District Court of and for the Southern District of New York, held at the United States Courthouse, Foley Square, in the Borough of Manhattan, City and State of New York, on the 27th day of April, 1948. 361

Present:

HON. HAROLD R. MEDINA,

District Judge.

Ad. 135-171

362

[SAME TITLE]

This cause having come on to be heard in its regular order on October 29, 1947, upon the pleadings and proofs, and having been argued and submitted by the advocates of the respective parties, and the Court after due deliberation having rendered its opinion in writing and directing a decree granting libellant his damages of and from the respondent, American South African Line, Inc., in the sum of $644.16, together with costs against the respondent, American South African Line, Inc. and dismissing the libel as to the respondent, United States of America, as owner of the steamship "ANNA HOWARD SHAW", and the respondents having moved this court for an order granting a re-hearing of the above-entitled case, and the said motion having been denied, the court after due deliberation having filed its opinions in writing and its 363

findings of fact and conclusions of law, and libellant's costs
364 having been duly taxed at the sum of $36.00,

Now, on motion of Saul Sperling, proctor for the libellant, it is

ORDERED, ADJUDGED and DECREED that the libellant recover of and from the respondent, American South African Line, Inc., which name has since changed to Farrell Lines, Inc., the sum of $644.16, together with the libellant's costs taxed in the sum of $36.00 and amounting in all to the sum of $680.16, with interest thereon until paid; and it is
365 further

ORDERED, ADJUDGED and DECREED that the libel herein against the respondent United States of America, as owner of the steamship "ANNA HOWARD SHAW" be and the same hereby is dismissed, and it is further

ORDERED, that unless this decree be satisfied or an appeal taken therefrom within ten (10) days after service of a copy of this decree upon the respondent, American South African Line, Inc., or its proctors, the libellant have execution against the respondent, American South African
366 Line, Inc., which name has since changed to Farrell Lines, Inc., and its stipulators for costs, their goods, chattels and lands forthwith to satisfy this decree.

HAROLD R. MEDINA,
U. S. D. J.

Affidavit of Costs and Disbursements

UNITED STATES DISTRICT COURT 367

SOUTHERN DISTRICT OF NEW YORK

Ad. 135-171

[SAME TITLE]

COSTS

Proctor's docket fee $20.00 368

DISBURSEMENTS

Clerk's fees 15.00

Copy of opinion on re-argument 1.00

Costs Taxed $36.00
5/3/48

Taxed with approval of both sides.

WILLIAM V. CONNELL, 369
Clerk.

Affidavit of Costs and Disbursements

STATE OF NEW YORK,
370 CITY OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

Harold J. Olliffe, being duly sworn deposes and says that he is associated with Saul Sperling, the attorney for the plaintiff in the above entitled action. That the disbursements above specified have been made in the said action or will necessarily be made or incurred therein; that a decision has been rendered after trial in favor of the plaintiff.

371 HAROLD J. OLLIFFE

(Sworn to April 26, 1948.)

372

Notice of Appeal and Order Allowing Appeal

UNITED STATES DISTRICT COURT

373

SOUTHERN DISTRICT OF NEW YORK

WALTER K. WARREN,

Libelant,

—against—

UNITED STATES OF AMERICA and
AMERICAN SOUTH AFRICAN LINE, INC.,

Respondents.

374

SIR:

PLEASE TAKE NOTICE that the American South African Line, Inc., now known as Farrell Lines, Inc., respondent, hereby appeals to the United States Court of Appeals for the Second Circuit from the final decree entered herein on the 3rd day of May, 1948, which ordered, adjudged and decreed that the libelant recover of the respondent, American South African Line, Inc., the sum of $644.16, together with costs.

375

Dated: New York, N. Y.
May 3rd, 1948.

Yours, etc.,

376

KIRLIN CAMPBELL HICKOX & KEATIN
Proctors for Respondent
American South African Line,
and Counsel to

JOHN F. X. MCGOHEY,
United States Attorney,
120 Broadway,
New York 5, New York.

377 To:

SAUL SPERLING, ESQ.,
61 Whitehall Street,
New York 4, New York.

The foregoing appeal is hereby allowed.

HULBERT
U. S. D

Dated, New York, May 3rd, 1948.

378

Assignments of Error of Appellant

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Respondent, American South African Line, Inc., assigns error to the final decision and decree of the district court in the following respects:

1. In that the court awarded libelant maintenance and cure damages against respondent, American South African Line, Inc., although the court found:

(a) That at the time the libelant sustained his injuries he was on shore leave and enjoying his own pleasure;

(b) That at the time the libelant sustained his injuries he was three miles from the place where he had landed in a motorboat from his ship.

(c) That at the time the libelant sustained his injuries he was in a dance hall;

(d) That his injuries were sustained when he fell from a ledge, unprotected by any railing, from which there was a 35 foot drop to the rocks below;

(e) That the ledge was but 2 1/2 to 3 feet wide outside of the building;

(f) That at the time he fell the toes of libelant's shoes
382 were approximately 6 inches from the edge and that he leaned over so that his head protruded slightly beyond the edge of the ledge.

(g) That he did nothing to protect himself save to take hold of what he then concluded after only a glance was a lightening arrester or something like that.

(h) That the libelant was less than sober at the time of his injury.

383 2. In that the court found that the libelant at the time he fell was in the service of the ship although the court also found that at the time the libelant sustained his injuries he was on shore leave and enjoying his own pleasure.

3. In that the court found that the libelant at the time he fell was in the service of the ship although the court also found that at the time the libelant sustained his injuries he was three miles from the place where he had landed in a motorboat from his ship.

4. In that the court found that the libelant at the time
384 he fell was in the service of the ship although the court also found that at the time the libelant sustained his injuries he was in a dance hall.

5. In that the court found that the libelant at the time he fell was in the service of the ship although the court also found that libelant's injuries were sustained when he fell from a ledge, unprotected by any railing, from which there was a 35 foot drop to the rocks below.

Assignments of Error of Appellant

6. In that the court found that the libelant at the time he fell was in the service of the ship although the court also found that the ledge from which libelant fell was but 2 1/2 to 3 feet wide outside of the building. 385

7. In that the court found that the libelant at the time he fell was in the service of the ship although the court also found that at the time he fell the toes of libelant's shoes were approximately 6 inches from the edge and that he leaned over so that his head protruded slightly beyond the edge of the ledge.

8. In that the court found that the libelant at the time he fell was in the service of the ship although the court also found that at the time the libelant sustained his injuries he did nothing to protect himself save to take hold of what he then concluded after only a glance was a lightening arrester or something like that. 386

9. In that the court found that the libelant at the time he fell was in the service of the ship although the court also found that at the time the libelant sustained his injuries he was less than sober.

10. In that the court failed to find that at the time he fell libelant was under the influence of alcohol. 387

11. In that although the court found that libelant had been indulging in alcohol to some extent the court nonetheless found that the acts of libelant did not constitute gross negligence or misconduct.

Assignments of Error of Appellant

12. In that although the Army Hospital records showed
388 that libelant was suffering from acute alcoholism at the time of his accident, the court nonetheless found that he was not so under the influence of alcohol as to be barred from recovery of maintenance.

13. In that the court failed to find that the libelant's injuries were due to his misconduct or gross negligence.

14. In that the court found that libelant did not act in reckless disregard of his own safety nor was he grossly negligent.

389

15. In that the court found that the libelant's injury was not brought about by willfulness on his part.

16. In that the court found that libelant's injury was not brought about by his gross negligence.

17. In that the court found that libelant could not have been grossly negligent unless there was also an element of willfulness "or something akin to it" in his conduct.

18. In that although the court found that the buildings in the town where the accident happened showed evidence
390 of having been in an area of active war, the court failed to find libelant guilty of negligence in attempting to support himself by a lightening arrester or something like that, the character of the fastenings of which he did not know.

19. In that although the court found it was a perilous undertaking for one to go out on a ledge from which the libelant fell and even more perilous to lean out on the

ledge to get a better view of the waves and rocks below, the court nonetheless found that such acts of the libelant did not constitute gross negligence or misconduct. 391

20. In that although the court found that respondent, American South African Line, Inc., was not acting otherwise than as general agent for the United States of America with regard to the Steamship ANNA HOWARD SHAW under the customary form of general agency agreement the court also found that the said respondent American South African Line, Inc., was libelant's employer and as such liable for maintenance and cure.

392

21. In that the court found that when libelant first reported for work aboard the ANNA HOWARD SHAW he knew he was going to work for a company by the name of American South African Line, Inc.

22. In that the court found that the libelant when he first reported for work was going to work for the American South African Line, Inc., and that the libelant so knew.

23. In that although the answer of respondent, American South African Line, Inc., denied it was the employer of libelant the court found that respondent American South African Line Inc., was the employer of libelant without proof thereof. 393

KIRLIN CAMPBELL HICKOX & KEATING,
Proctors for Respondent
American South African Line, Inc.,
Office and Post Office Address,
120 Broadway,
Borough of Manhattan,
City of New York 5.

Cross Assignments of Error

394 UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Ad. 135-171

[SAME TITLE]

1. The District Court erred in dismissing the libel herein against the respondent, United States of America.

395 2. The District Court erred in entering a decree in favor of the United States of America against libelant.

3. The District Court erred in finding the libelant failed to institute his action against the respondent, United States of America, in the proper district.

4. The district Court erred in holding that the objection of the respondent, United States of America, to the venue of the proceeding was well taken despite said respondent's general appearance and contestation of the merits of the action.

396

5. The District Court erred in failing to hold and find that Section 2 of the Suits in Admiralty Act (46 U. S. C. Sec. 742) was a venue provision rather than a jurisdictional provision applying to the subject matter.

6. The District Court erred in failing to interpret that the Suits in Admiralty Act (Title 46 U. S. C. 742) as the consent by the Government to be sued in actions such as

this arising out of the operation of a merchant vessel where a similar action could be maintained against a private owner or ship. 397

7. The District Court erred in dismissing the libel against respondent, United States of America, despite the fact that the vessel involved, the S. S. ANNA HOWARD SHAW docked at New York on June 4, 1945, less than two months after the filing of said respondent's answer, and again docked on February 3rd, 1946, during the pendency of the instant proceeding.

8. The District Court erred in holding as a conclusion of law that the suit against the respondent, United States of America, was not brought in the proper district. 398

Dated, New York, June 17th, 1948.

SAUL SPERLING,
Proctor for Libelant,
61 Whitehall Street,
New York 4, N. Y.

399

Stipulation as to Exhibits

400 UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

It is hereby stipulated that the exhibits (other than libelant's exhibits 1, 2, and 3) need not be printed but may be handed to the court at the argument of the appeal.

401 SAUL SPERLING,
Proctor for Appellee.

KIRLIN CAMPBELL HICKOX & KEATING,
Proctors for Appellant.

402

Stipulation as to Record

UNITED STATES DISTRICT COURT 403

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

IT IS HEREBY STIPULATED AND AGREED that the foregoing is a true copy of the transcript of the record of the said District Court in the above-entitled matter, as agreed on by the parties.

404

Dated: June , 1948.

SAUL SPERLING,
Proctor for Appellee.

KIRLIN CAMPBELL HICKOX & KEATING,
Proctors for Appellant.

405

Clerk's Certificate

406 UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK, *ss.*:

407 I, WILLIAM V. CONNELL, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties. The last day to file this record is

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this day of June in the year of our Lord one thousand nine hundred and forty-eight and of the independence of the said United
408 States the one hundred and seventy-second.

WILLIAM V. CONNELL,
Clerk.

(Seal)

[fol. 137] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1949

No. 45

(Argued December 9, 1949. Decided December 27, 1949)

Docket No. 21410

WALTER K. WARREN, Libellant-Appellee,

v.

UNITED STATES OF AMERICA, Respondent

and

AMERICAN SOUTH AFRICAN LINE, INC., Respondent-Appellant

Before L. Hand, Swan and Frank, Circuit Judges

Appeal from the United States District Court for the Southern District of New York

Suit in admiralty for the recovery of maintenance wherein the libellant was awarded a decree against American South African Line, Inc., as general agent of a merchant vessel of [fol. 138] the United States, and the libel against the United States was dismissed. 75 F. Supp. 210, 76 F. Supp. 735. American South African Line, Inc., has appealed from the decree against it and libellant, by cross-assignments of error, has appealed from dismissal of his libel against the United States. Decree for libellant reversed and dismissal of the libel affirmed on the merits.

Kirlin, Campbell, Hickox and Keating, Proctors for Appellant and Counsel to John F. X. McGohey, United States Attorney; Walter X. Connor and Vernon Sims Jones, Advocates.

Saul Sperling, Proctor for Appellee; Lester Lyons, Advocate.

SWAN, Circuit Judge:

The libellant, a messman employed on a merchant vessel of the United States, sustained injuries during shore leave. The decree on appeal awarded him maintenance in the sum of $644.16 against the appellant, American South African

Line, Inc., which managed certain phases of the ship's business under the war-time standard form of General Agency Agreement. Subsequent to entry of the decree, it was authoritatively determined that such an agent is not liable for maintenance. *Fink* v. *Shepard S. S. Co.*, 337 U. S. 810, 815. Accordingly the parties have agreed that the decree against American South African Line, Inc., shall be reversed without costs.

The libel against the United States was dismissed for improper venue. The libellant was not a resident of the Southern District of New York and when the libel was filed the vessel on which he had been employed was not [fol. 139] within that district.[1] Section 2 of the Suits in Admiralty Act, 46 U. S. C. A. § 742, prescribes the venue for suits of this character.[2] *Hoiness* v. *United States*, 335 U. S. 297. Plainly venue was lacking when the libel was filed, and the answer of the United States pleaded this as a defense.[3] At the trial, however, it was stipulated that the vessel was within the Southern District of New York during the pendency of the action.[4] The libellant contends that this cured any defect of venue. We think he is right.

If a libel *in rem* is filed against a privately owned vessel not in the district, the vessel may be arrested when she comes within the district and the suit may thereafter proceed. See *F. E. Grauwiller Transp. Co.* v. *Exner Sand*

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[1] The libel alleged that the S. S. Anna Howard Shaw "is now, or during the pendency of this action will be in the Port of New York and within the territory and jurisdiction of the United States of America."

[2] Section 2 provides in part as follows:

> "* * * Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found."

[3] The answer also pleaded to the merits but this did not waive the objection to venue. *Untersinger* v. *United States*, 2 Cir., 172 F. 2d 298; *Orr* v. *United States*, 2 Cir., 174 F. 577.

[4] The libel was filed March 2, 1945. The trial was in October 1947. The vessel docked at New York on June 4, 1945 and again on February 3, 1946.

& Gravel Corp., 2 Cir., 162 F. 2d 90, 92; *Pacific Coast S. S. Co.* v. *Bancroft-Whitney Co.*, 9 Cir., 94 F. 180, 185, reversed on other grounds, *Queen of the Pacific*, 180, U. S. 59. The Suits in Admiralty Act substitutes for seizure of the vessel the filing of a libel containing an election to proceed *in rem* and the service of copies of the libel on the United States Attorney and the Attorney General. Since a government-owned vessel cannot be arrested, the most that could be demanded of a libellant who had filed his libel *in rem* during the vessel's absence, would be some symbolic equiva- [fol. 140] lent of an arrest when she later came into the district. We can think of nothing he could do as such a symbolic equivalent except to serve again a copy of his libel; and that would be a pure formality having no useful purpose provided the original service gave notice that the suit was *in rem*, as it did in the case at bar.[5] In *Carroll* v. *United States*, 2 Cir., 133 F. 2d 690, 692, we suggested that it might be sufficient to sustain jurisdiction *in rem* that the ship was within the United States at the time of the trial "since the filing of a second libel would be a mere matter of form." That suggestion was again alluded to in *Schnell* v. *United States*, 2 Cir., 166 F. 2d 479, 482, and in *Grant* v. *U. S. War Shipping Administration*, 65 F. Supp. 507, 510 (D. C. Pa.). We now accept the suggestion and hold that the defect in venue which existed when the libel was filed was cured when the vessel came within the Southern District of New York. Whether for purposes of laches the suit should be deemed to have been begun when the libel was filed or only when the vessel came within the jurisdiction of the court is a question not now presented nor considered.[6]

On the merits the libellant is entitled to maintenance under the doctrine of *Aguilar* v. *Standard Oil Co.*, 318 U. S. 724, unless his injuries resulted from "some wilful misbehavior or deliberate act of indiscretion" of his own, p. 731. In the decisions there cited the phrase "gross negligence" is used to describe conduct which will preclude recovery of main-

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[5] Cf. *Schnell* v. *United States*, 2 Cir., 166 F. 2d 479, 482, where the libel, a copy of which was served, was *in personam*.

[6] See note 4, *supra*.

tenance.[7] In the case at bar the libellant stood on the brink of a precipitous cliff and leaned forward over the edge in [fol. 141] order to get a better view of the rocks and waves thirty-five feet below. His right hand grasped a rod half an inch in diameter which he assumed from a casual glance to be fastened to the building in which he had been dancing and drinking wine. The rod came loose and he was precipitated over the edge of the cliff. The district judge found that he was not so under the influence of alcohol as to be barred from recovery of maintenance; and that he did not act in reckless disregard of his own safety nor was he grossly negligent.

We accept the finding that libellant was not drunk. Whether he was "grossly negligent" poses a question which is always difficult to answer. See *Moisan* v. *Loftus*, 2 Cir., decided December 1, 1949. Before the Supreme Court's decision in the *Aguilar* case, *supra*, 318 U. S. 724, it was not necessary to assess a libellant's degree of care when his injury occurred during a period of relaxation afloat or ashore, for he was barred from recovery on the theory that he was not then in the service of his ship. See *Meyer* v. *Dollar S. S. Lines*, 9 Cir., 49 F. 2d 1002. And when his conduct was examined, the degree of his fault was sometimes assimilated, on a rather ambiguous theory of proximate cause, to the issue of whether he was in his ship's service. See *Jackson* v. *Pittsburgh S. S. Co.*, 6 Cir., 131 F. 2d 668. Accordingly, the pre-*Aguilar* cases are of little assistance in guiding us to a correct decision here.

Since *Aguilar*, a number of decisions have awarded maintenance and cure to seamen engaged in their own pursuits ashore under circumstances which did not compel assessment of what degree of negligence should be ascribed to their conduct.[8] The question was squarely presented, [fol. 142] however, in *Ellis* v. *American Hawaiian S. S. Co.*,

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[7] *Peterson* v. *The Chandos*, 4 F. 645, 651 (D. C. Ore.); *The J. F. Card*, 43 F. 92, 93 (D. C. N. Y.); *The Ben Flint*, 3 Fed. Cas. No. 1299 (D. C. Wis.). See also *Jackson* v. *Pittsburgh S S. Co.*, 6 Cir., 131 F. 2d 668, 670.

[8] *Kyriakos* v. *Goulandris*, 2 Cir., 151 F. 2d 132; *Nowery* v. *Smith*, 69 F. Supp. 755 (D. C. Pa.), aff'd, 3 Cir., 161 F. 2d 732; *Smith* v. *United States*, 4 Cir., 167 F. 2d 550; *Grovell* v. *Stockard S. S. Co.*, 78 F. Supp. 931 (D. C. Pa.).

9 Cir., 165 F. 2d 999. There, the libellant had gone ashore to a Service Club, where he had "a few beers." He then proceeded to dive into a swimming pool containing only four feet of water. Two dives were successful; on the third he struck his head against the pool's bottom. In holding his conduct not so negligent as to bar recovery of maintenance and cure, the court stressed that the danger was not great; on the contrary, Ellis had dived twice without harm before meeting with his accident.

In the case at bar, the risk of serious injury or even death if the seaman should fall over the cliff, was obvious; and the requisite degree of care correspondingly higher. In the face of evident danger, the care which Warren took was very slight—a mere casual glance at the rod which he thought to be a "lightning arrester or something of that type." We think that a man who acts as he did under circumstances of danger does not show even a minimal degree of regard for the consequences of his act. Unless his ship is to be an insurer of his safety, he cannot recover against her.

Dismissal of the libel against the United States is affirmed on the merits; the decree against the ship's agent is reversed without costs.

[fol. 143] UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 27th day of December one thousand nine hundred and forty-nine.

Present: Hon. Learned Hand, Chief Judge; Hon. Thomas W. Swan, Hon. Jerome N. Frank, Circuit Judges.

WALTER K. WARREN, Libellant-Appellee,

vs.

UNITED STATES, Respondent

and

AMERICAN SOUTH AFRICAN LINE, INC., Respondent-Appellant

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that that part of the decree dismissing the libel against the United States be and it hereby is affirmed on the merits; that part of the decree awarding maintenance against the ship's agent be and it hereby is reversed without costs in accordance with the opinion of this Court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk; by (S.) A. Daniel Fusaro, Deputy Clerk.

[fol. 144] [Endorsed:] United States Court of Appeals, Second Circuit. Walter K. Warren v. United States & American South African Line. (45). Judgment. United States Court of Appeals, Second Circuit. Filed December 27, 1949. Alexander M. Bell, Clerk.

[fol. 145] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket #21410. October Term 1949

WALTER K. WARREN, Libelant-Appellee,

against

UNITED STATES OF AMERICA, Respondent

and

AMERICAN SOUTH AFRICAN LINE, INC., Respondent-Appellant

Petition for Re-Hearing

Saul Sperling, Proctor for Libelant-Appellee.
Lester Lyons, Advocate.

[fol. 146] To the Honorable Judges of the United States Court of Appeals for the Second Circuit:

The above named libellant respectfully presents this, his petition, for amendment of the opinion, and for rehearing of the above entitled cause, and in support thereof shows as follows:

1. This Court unduly restricted the policy and rule expounded in *Aguilar* v. *Standard Oil Co.* governing the right to maintenance and cure;

2. The facts show that even under the standard adopted by this Court libelant was not grossly negligent; and

3. Libelant is entitled to a recovery under the Shipowners' Liability Convention of 1936.

[fol. 147] POINT I

This Court Unduly Restricted the Policy and Rule Expounded in Aguilar vs. Standard Oil Co. Governing the Right to Maintenance and Cure

In its opinion herein, this Court held that "gross negligence" would and should preclude a recovery for maintenance, apparently on the basis of *Aguilar* vs. *Standard Oil Co.*, 318 U. S. 724 and the cases there cited. We respectfully submit that those cases do not require or even authorize such holding and that in any event the

concept of "gross negligence" was too narrowly applied herein. This Court, we submit, unduly assimilated that concept to situations involving negligence instead of equating non-recovery with wilful misbehavior.

The *Aguilar* case laid down a broad and beneficent rule in favor of seamen with regard to the right to recover maintenance and cure, and emphasized that *wilful misconduct* must exist to bar that right. Thus, the Court there said:

> "So broad is the shipowner's obligation that negligence or acts short of culpable misconduct on the seaman's part will not relieve him of the responsibility. Peterson v. The Chandos, 6 Sawy 544, 4 F. 645 (DC); see also The J. F. Card, 43 F. 92 (DC); The Ben Flint, 1 Abb (US) 126, 1 Biss 562, Fed. Cas. No. 1,299 (DC). Conceptions of contributory negligence, the fellow-servant doctrine, and assumption of risk have no place in the liability or defense against it. Only some wilful misbehavior or deliberate act of indiscretion suffices to deprive the seaman of his protection. The Ben Flint, 1 Abb (US) 126, 1 Biss 562, Fed. Cas. No. 1,299 (DC) supra." (Pp. 730-1).

[fol. 148] The instances betokening disqualifying misconduct were shown by that Court to have an element of wilfulness. Thus:

> "The traditional instances are venereal disease and injuries received as a result of intoxication, though on occasion the latter has been qualified in recognition of a classic predisposition of sailors ashore." (P. 731)

A tendency on the part of recent cases to limit the seaman's rights was condemned by the Court as "consonant neither with the liberality which courts of admiralty traditionally have displayed toward seamen who are their wards nor with the dictates of sound maritime policy." (P. 732)

The Court expounded as follows the necessity for a liberal attitude in behalf of seamen:

> "Certainly the nature and foundations of the liability require that it be not narrowly confined or whittled down by restrictive and artificial distinctions defeating its broad and beneficial purposes. If leeway is to be given in either direction, all the considerations

which brought the liability into being dictate it should be in the sailor's behalf." (P. 735-6)

The cases cited by the Court also stress the elements of wilfulness on the one hand and liberality on the other. Thus, in Peterson v. The Chandos, 4 F. 645, 651, where negligence on the part of a seaman was held not to preclude a recovery for maintenance, the Court said:

"It is the well-settled law that a seaman receiving an injury, or being sick in the service of the ship without his fault, is entitled to be cured or cared for at the expense of the vessel (citing cases). And the fault which will forfeit this right upon the part of the sea-[fol. 149] man must be some positively vicious conduct, such as gross negligence or wilful disobedience of orders. Ordinary negligence, consistent with good faith and an honest intention to do his duty, is not sufficient. (Citing cases.) The propriety and good policy of this rule is eloquently vindicated by Mr. Justice Story in *Harden* v. *Gorden, supra,* 547, and in the application of it a court of admiralty will not be quick to find cause to exclude the seaman from its benefits."

In The Ben Flint, 3 Fed. Cas. No. 1299, the Court said:

"Sailors are wards of the admiralty, and are rather excused than condemned for accidental mistakes while in the faithful and obedient discharge of duty. * * * Ordinary negligence, consistent with entire good faith, as in this instance, should not prejudice a sailor's just rights. The marine law rather overlooks ordinary negligence, but punishes those gross faults and vices which affect or prejudice the ship's service or discipline. * * * To forfeit a claim for care or attendance under the rule, the disability or sickness of the seaman must be owing to vicious or unjustifiable conduct, such as gross negligence operating in the nature of a fraud upon the owners, wilful disobedience to orders, and persistent neglect of duty."

In the recent case of *Kable* v. *U. S.*, 169 F. (2) 90, this Court spoke of "wilful misconduct" rather than of gross negligence as the disqualifying factor.

In the present case, this Court, in making merely "gross negligence" the test, consequently detracted from the force and spirit of the traditional and established policy governing the right to maintenance.

Moreover, where the term "gross negligence" has been used, as in some of the foregoing cases, it appears to connote or be juxtaposed with wilful misconduct, bad faith, [fol. 150] fraud, or other conscious or deliberate misbehavior. It is not employed as a mere variant of the general concept of negligence, requiring consideration of degrees of care or probability.

It may be noted that in other situations, not involving seamen, the term "gross negligence" has been assimilated to the concept of wilful misconduct. Thus, in *Crowell* v. *H. R. & R. Trucking Co.*, 157 F. (2d) 963 (CCA 5th), it was held that the terms "gross negligence" and "wilful and wanton misconduct" are synonymous. In *Krueger* v. *Taylor*, 132 F. (2d) 736 (U.S. Ct. App. D.C.), the Court said that gross negligence should be "wanton or reckless conduct", that a "momentary" failure to be alert and observant is not gross negligence, and that negligence "to be gross it should shock fair-minded men". In *McAlester* v. *Sinclair Refining Co.*, 146 F. (2d) 36 (CCA 5th), the Court, in stating that "gross negligence is positive or affirmative rather than merely passive or negative", and that it should "indicate wantonness or malice", also stated that it

> "should be that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the rights or welfare of the person or persons to be affected by it."

The test of wilfulness is better calculated than the gross negligence test, if the latter is regarded as simply being within the domain of negligence law, to admit of easier [fol. 151] administration and to facilitate the protection of a seaman's interests.

Where wilful misconduct is to be searched for, the inquiry is relatively simple, and there is not much room for different people to disagree as to the content of that term or as to its application. We are not obliged to make fine distinctions dependent essentially on degree. Where "gross negligence" is to be given definition or application, we

enter a sphere fraught with doubt, uncertainty, and great possibility of dispute among different reasonable persons. Thus, this Court and the trial Court did not see eye to eye as to the existence of "gross negligence" herein.

If, as this Court asserted in its opinion herein, gross negligence "poses a question which is always difficult to answer", this should be an added persuasive reason not to make gross negligence determinative of a seaman's rights. Bearing in mind, as stated in the *Aguilar* case, that "the nature and foundation of the liability require that it be not narrowly confined or whittled down by restrictive and artificial distinctions defeating its broad and beneficial purposes", we should not embrace a test which necessarily involves an excursus into a domain of refined philosophical or psychological analysis. See *Moisan* v. *Loftus*, decided by this Court December 1, 1949.

To try to distinguish between ordinary negligence and gross negligence, particularly in situations where the [fol. 152] environment, experience and mentality of seamen —matters usually not shared by lawyers and judges—are the pertinent factors, may result in keen and interesting analysis, but, even unwittingly, it may be at the expense of that "liberality with which admiralty courts have traditionally interpreted rules devised for the benefit and protection of seamen who are its wards" (*Calmar S. S. Corp.* v. *Taylor*, 303 U. S. 525, 529). This Court has found in the policy of "the traditional protection accorded seamen as wards of the admiralty" an additional factor warranting a seaman's right to recover in a situation otherwise noncompensable (*Krey* v. *U. S.*, 123 F. (2d) 1009, 1010).

In the light of the foregoing cases, we submit that the test of mere "gross negligence" adopted by this Court is unduly restrictive and sacrificial of libelant's rights; that it has legal and factual implications which do not equitably or practicably serve the interests of seamen; that it does not promote the policy of protecting this Court's wards; that it involves unnecessarily difficult inquiries foreign to the spirit of the "rules devised for the benefit and protection of seamen"; that it imposes an undue burden on seamen; and that it should not be invoked here. Unless libelant is shown to have been guilty of wilful misconduct, his right to recover maintenance should not be barred. [fol. 153] In the present case, there was, of course, no wilful misconduct. Even if libelant's negligence were of an

aggravated character—which we do not concede—it would not yet be misconduct, certainly not wilful misconduct. It would still be negligence.

Noting that in some respects the liability for maintenance and cure is greater than the employer's liability under general workmen's compensation statutes (See *Aguilar* v. *Standard Oil Co., supra; Kable* v. *U. S., supra*), and that under such statute recovery may be had even if the injured employee were "stupidly negligent" (*Mausert* v. *Albany Builders' Supply Co.*, 250 N. Y. 21, 23), and further noting that the liability for maintenance and cure has aspects of "job insurance" (*Smith* v. *U. S.*, 167 F. (2d) 550 (CCA 4th); *Robinson on Admiralty*, 291), there is further justification for not holding libelant herein to the relatively rigorous and narrow standard which was here applied.

Where in Warren's conduct was the "*positively vicious* conduct" (*Peterson* v. *The Chandos, supra*) or the "*vicious or* unjustifiable conduct" (*The Ben Flint, supra*) specified in both cases (both cited in *Aguilar*) as the meaning of "gross negligence" as there used? Warren's interest was -esthetic beauty—the "scene" or "view"—completely opposite to "vicious conduct", and evidencing, rather, precisely that relaxation mentioned in *Aguilar* vs. *Standard Oil Co.*

[fol. 154] Point II

The Facts Show that Even under the Standard Adopted by This Court Libelant Was Not Grossly Negligent

Neither our brief on the appeal nor this Court's opinion refers to a number of facts appearing in the record which seem to demonstrate conclusively—or at least to warrant a finding—that libelant had exercised due care and had in no event been guilty of gross negligence. We respectfully present these facts here.

Libelant's fall was not from a cliff, as the opinion herein states, but from a ledge or platform which was an extension of a room (113-4). The room had large French doors which were opened and faced the water, and a breeze was blowing in (197-8). The ledge was about 2½ to 3 feet wide (199) and "was quite a good length", being "probably to the nearest calculation about three or four sets of doors, with a post between or some setup of that type" (259).

It was what might be called "the edge of the room" (203-4). Other people went on the ledge to look at the scenery and walked away (201). As libelant testified:

> "Q. Were there any other people on that ledge?
>
> A. Yes, there were people all around there. I judge there were five or six people around in that room and out to the edge, and there was probably some on each side of me. I really didn't pay any attention because I was thinking about the scenery out across the bay" (262-3).

[fol. 155] On the ledge were masonry posts, which were regular parts of the building (199-200). The posts held up the roof (259) which came over and covered the ledge (260). Attached to a post was a metal pipe or rod which went from the floor of the ledge up above him (209). It was about a half-inch in diameter (114) and was up to 12 feet long (205). There "were brackets on it" which fastened it to the post. They were "Some kind of metal brackets fastened in the masonry" (206).

Before taking hold of this rod, libelant looked at it to see whether it was all right. Thus, he looked at it "just casually. As you would glance on it, if it would look all right" (208). It appeared to him to be "solid" (253) and to be affixed to the post as a "hand-hold" (209). It seemed to be there more as a hand-hold than as a lightning rod (208). As he testified:

> "Q. Was there anything about the structure which would lead you to suppose that it was there because somebody want- to hold on to it rather than for some other reason? A. On second thought it seemed to have —it went nowhere near the length of the floor. *It was probably more of a hand-hold than anything else.*
>
> Q. And you think because it went from the floor of the ledge up above you that *it was something to hold on to?* A. *It possibly was for that purpose more than any other reason.*
>
> Q. What you are telling us now I take it, is something that you have considered this structure and this attachment to the post and *you now think it may have been there to hold on to?*

[fol. 156] "A. From your remarks and one thing or another you bring out points that I did not think of before, and perhaps maybe *you are more correct than my* first observation" (209-210).

When he was about six inches to a foot away from the edge, he took hold of the rod and leaned over, and could see another ledge about 15 feet below (247-9). He held "the iron with the idea it was up there solid" (253). Wholly unexpectedly the rod became loose and caused him to lose his balance (114, 253). Thus, "it let loose unexpectedly, which was quite a surprise", and "I did not have time to recover myself, so I held on to it and I went straight down" (114-5). The rod "pulled loose so easily that it was such a quick surprise that I couldn't recover myself" (202).

We respectfully submit that the foregoing testimony warranted the trial Court's finding that libelant had not been grossly negligent or reckless. The observation he made of the rod was sufficient under the circumstances. He said that "Naturally you wouldn't make a very close observation" (208). We do not believe the average man would make "a very close observation". We submit that failure to make "a very close observation" is not gross negligence.

Germane here is *Moisan* v. *Loftus, supra,* where this Court held that no gross negligence, but at most ordinary negligence, existed where a truck driver sped over 50 miles per hour on low beam headlights over an unfamiliar country road at midnight and skidded over a frozen patch [fol. 157] which he had not noticed. There, this Court said:

> "Confining ourselves therefore to the factor of probability, it appears to us that the chance that the truck would leave the road that night was slight."

Similarly, it may justifiably be said here that the chance that the rod libelant had held would break loose was slight.

In the *Moisan* case, this Court said:

> "Even if it was careless—which we question—not to apprehend that what looked like water might be frozen, but it was at least not reckless to think that it would be water. The most that we can see in the evidence is the kind of carelessness which all of us fall

into every day, and which does not condemn those guilty of it in the somewhat rhetorically condemnatory terms of the accepted definition."

Similarly, it may justifiably be said here that libelant was not reckless in not apprehending that the rod was not securely attached to the post.

If libelant was at fault, the fault was minor, ordinary, and unconscious. There was no egregious recklessness or deliberate disregard of any effort to exercise care or to form a judgment as to the purpose of the rod. Libelant had no reason to believe that his judgment that the rod was a hand-hold was erroneous. The danger was hidden and unknown and resulted from the circumstance not that the rod was not a hand-hold but that it was loose. That it was loose was not apparent to the sense of sight which libelant exercised. We submit that he was not required, at the risk [fol. 158] of being held grossly negligent, to test the rod by exercising his sense of feeling before using it for the purpose it appeared to have.

Persons stepping into unattended elevators do not first test the floor to see whether the elevator may fall because of a loose cable. Persons leaning against guard rails in the subway do not first test the rails to see whether they are too loose to bear weight. Persons holding on to straps in a train do not first test the straps to see whether they are too loose to sustain weight. Similarly, libelant acted in a normal manner in taking hold of the rod after it appeared to him to be a "hand-hold".

We submit that to hold that libelant had been guilty of gross negligence and should be barred from recovering merely maintenance and cure goes unduly beyond what the conduct of ordinary men, the authorities, and the interests of justice require.

[fol. 159] Point III

Libelant Is Entitled to a Recovery under the Shipowners' Liability Convention of 1936

Under the Shipowners' Liability Convention of 1936, effective for the United States and its citizens on October 29, 1939 (54 Stat. 1693), by Presidential Proclamation, the liability of the shipowner appears to be absolute. Thus,

clause "1" of Article 2 of said Convention provides as follows:

> "1. The shipowner shall be liable in respect of—
>
> (a) sickness and injury occurring between the date specified in the articles of agreement for reporting for duty and the termination of the engagement;
>
> (b) death resulting from such sickness or injury."

Clause "2" of said Article provides for exceptions as follows:

> "2. Provided that national laws or regulations may make exceptions in respect of:
>
> (a) injury incurred otherwise than in the service of the ship;
>
> (b) injury or sickness due to the wilful act, default or misbehavior of the sick, injured or deceased person;
>
> (c) sickness or infirmity intentionally concealed when the engagement is entered into."

While clause "1" authorizing the recovery is self-executing, the exceptions permitted by clause "2" are not operative in the absence of Congressional legislation giving [fol. 160] them effect (Stone, C. J., in *Aguilar v. Standard Oil Co.*, 318 U. S. 724, 738).

Accordingly, in the present case even if there were culpable misconduct on the part of the libellant, he would not be precluded from, but rather would be entitled to, a recovery under said Convention. It may also be noted that under clause "2" aforementioned, the exception based on misconduct of the injured person requires the misconduct to be "wilful". This is a further indication of the policy of the law not to withhold a recovery from an injured seaman where his misconduct is not the result of a wilful act.

The Importance of the Case

No right could be more important to seamen than maintenance and cure; and any "leeway" is to be made "*in the sailor's behalf*" (*Aguilar, supra*). This Court's decision not only gives no "leeway" to the sailor, but shifts to the opposite trend the basic principles on which maintenance and cure rests. Its importance is shown also by Judge

Medina's careful opinion, and his entertaining a motion by respondent for reargument below. We submit this Court should review this all important question now at the libellant's instance. We submit it is so all important that, unless the Court is disposed forthwith to amend its decision in this respect, leave should be granted for new briefs and oral reargument.

[fol. 161] Conclusion

It is respectfully submitted that the Court erred in points of law and fact and should in justice, grant libelant a rehearing.

Respectfully submitted, Saul Sperling, Proctor for Libelant.

Lester Lyons, Advocate.

[fol. 162] It is certified that this petition is well based in law and fact and not made for the purpose of delay.

Dated: New York City, New York, January 11th, 1950.

Respectfully submitted, Saul Sperling, Proctor for Libellant; Office & P. O. Address, 61 Whitehall Street, New York City, New York.

[fol. 163] UNITED STATES COURT OF APPEALS FOR THE SEC
CIRCUIT

No. 45—October Term, 1949

(Petition filed January 11, 1950. Decided March 2, 19

Docket No. 21410

WALTER K. WARREN, Libellant-Appellee,

vs.

UNITED STATES OF AMERICA, Respondent

and

AMERICAN SOUTH AFRICAN LINE, INC., Respondent-Appel

Before: L. HAND, SWAN and FRANK, *Circuit Judg*

PETITION FOR REHEARING

Saul Sperling, Proctor for libellant-appellee, Le
Lyons, of counsel.

Irving H. Saypol, United States Attorney, Proctor
respondent-appellee, United States of America; Ki
Campbell, Hickox & Keating, and Walter X. Connor
Vernon S. Jones, of counsel.

[fol. 164] SWAN, Circuit Judge:

By petition for rehearing the libellant has presented
contention that our decision disregards the provision
the Shipowners' Liability Convention of 1936, proclaime
the President to be effective as to the United States an
citizens as of October 29, 1939, 54 Stat. 1693-1704. Artic
of the Convention is printed in the margin.[1] The libel

---

[1] "Article 2.

"1. The shipowner shall be liable in respect of—

(a) sickness and injury occurring between the
specified in the articles of agreement for reporting for
and the termination of the engagement;

(b) death resulting from such sickness or injury.

argues that while Clause 1 is self-executing, the exceptions permitted by Clause 2 do not become operative without express Congressional action putting them into effect. This was the opinion expressed by Chief Justice Stone in concurring in the result in *Waterman Steamship Corp.* v. *Jones*, reported in *Aguilar* v. *Standard Oil Co.*, 318 U. S. 724 at 738. Further support for the view that the Convention is self-executing may perhaps be found in language used without discussion of the problem in *O'Donnell* v. *Great Lakes Co.*, [fol. 165] 318 U. S. 36, 42 and *Farrell* v. *United States*, 336 U. S. 511, 517.

If it be assumed that Clause 1 of Article 2 is self-executing, there would seem to be equal reason to make the same assumption as to Clause 2, unless the phrase "national laws or regulations" must be interpreted to exclude decisional law and refer only to legislation. It is true that Chief Justice Stone in the *Aguilar* case, *supra*, after stating that the first clause of Article 2 is self-executing went on to say "and that the exceptions permitted by Clause 2 are not operative in the absence of Congressional legislation giving them effect." This bald statement of opinion does not disclose any reasons in support of it, and despite the high regard we have for any utterance of Chief Justice Stone, independent examination of the question constrains us respectfully to disagree. When the Convention was proclaimed to be effective, the existing maritime law of the United States recognized not only the shipowner's duty to pay maintenance and cure but also exceptions to that duty in case the seaman's injury or sickness was due to his own

---

2. Provided that national laws or regulations may make exceptions in respect of:

(a) injury incurred otherwise than in the service of the ship;

(b) injury or sickness due to the wilful act, default or misbehavior of the sick, injured or deceased person;

(c) sickness or infirmity intentionally concealed when the engagement is entered into.

3. National laws or regulations may provide that the shipowner shall not be liable in respect of sickness, or death directly attributable to sickness, if at the time of the engagement the person employed refused to be medically examined."

"wilful act, default or misbehavior" or in case he "intentionally concealed" sickness or infirmity existing when he signed the ship's articles. These are the same exceptions in respect of which Clauses 2(b) and 2(c) of Article 2 declare that "national laws or regulations may make exceptions." While it is conceivable that Article 2 contemplated that Clause 1, which is declaratory of the existing duty to pay maintenance and cure, should be self-executing but that the exceptions presented by Clause 2 should not be operative unless and until carried into effect by Congressional legislation, it seems to us most improbable that such a result was intended. It would mean that part of the existing decisional law was to continue and part was to be repealed, no matter how long the repealed part had been the settled [fol. 166] policy of the state; and that to re-establish that policy the state must take affirmative legislative action. In the meantime, the repeal would benefit only seamen who are least deserving of protection, since their sickness or injury resulted from their own default or was intentionally concealed from their employer. We cannot believe this was intended. Furthermore, it may be noted that Clause 3 of Article 4 provides that if there is "in force" in the ferritory in which the vessel is registered, "a scheme applying to seamen of compulsory sickness insurance," etc., such "scheme" will modify the general rule of liability declared by paragraph 1 of Article 4. In other words, it does not require legislation to make effective exceptions to the general rule if a "scheme" is already "in force." It is true that the language of Clause 3 of Article 4—"national laws or regulations may provide"—is not precisely the same as in Clause 2 of Article 2, "national laws or regulations may make exceptions in respect of." But in substance we think it is the same. Article 12 also indicates that not all existing decisional law is to be repealed. Our study of the Convention leads us to the conclusion that if Clause 1 of Article 2 is self-executing so also is Clause 2. If, on the other hand, Clause 1 of Article 2 is not self-executing the Convention does not apply. Either construction of Clause 1 leads to the conclusion that our decision is not affected by the terms of the Convention.

As his final argument the libellant urges that even if Clause 2 is to be deemed self-executing, gross negligence is not within the exception of injury due to the "wilful act, de-

fault or misbehavior" of the seaman. These words are used to describe conduct which will preclude recovery of maintenance, and that is precisely the meaning of "gross negligence" as stated in our original opinion.

The petition for rehearing is denied.

[fol. 167] FRANK, Circuit Judge (dissenting):

O'Donnell v. *Great Lakes Co.*, 318 U. S. 36, 42, and *Farrell* v. *United States*, 336 U. S. 511, 517, seem to me to leave no doubt that the Supreme Court has held provisions of the Convention, similar to Clause 1 of Article 2, to be self-executing. The only question, then, is whether Clause 2 of Article 2—*i. e.*, "that national laws or regulations may make exceptions"—is to be interpreted as if it read "existing national laws, regulations or decisional rulings, shall constitute exceptions." Chief Justice Stone, in his concurring opinion in *Waterman S. S. Co.* v. *Jones*, reported in *Aguilar* v. *Standard Oil Co.*, 318 U. S. 724, 738, said that he was of "opinion that Article 2, Clause 1 of the Treaty authorizing the recovery is self-executing, and that the exceptions permitted by Clause 2 are not operative in the absence of Congressional legislation giving them effect. (See letter of Secretary of State to the President, dated June 12, 1939, quoted in H. R. Rep. No. 1328, 76th Cong., 1st Sess., pp. 5-7.)"

This interpretation seems to me to be in accord with both the literal and reasonable meanings of the words, and is supported by the cited interpretation given by the Secretary of State. The construction given by my colleagues seems to me to be unnecessarily complicated and insufficiently sustained by persuasive reasons to justify a disregard of Chief Justice Stone's views. My colleagues' use of Clause 3 of Article 4 as an aid in construing Clause 2 of Article 2 is weak, I think, for two reasons: (a) Clause 3 of Article 4 contemplates an existing "scheme" created by statute, not by a mere decisional product; and (b) it makes no reference to "exceptions," as does Clause 2 of Article 2.

[fol. 168] UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 2nd day of March, one thousand nine hundred and fifty.

Present: Hon. Learned Hand, Chief Judge; Hon. Thomas W. Swan, Hon. Jerome N. Frank, Circuit Judges.

WALTER K. WARREN, Libellant-Appellee,

v.

UNITED STATES OF AMERICA, Respondent; AMERICAN SOUTH AFRICAN LINE, INC., Respondent-Appellant

A petition for a rehearing having been filed herein by counsel for the Libellant-Appellee,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

(S.) Alexander M. Bell, Clerk.

[fol. 169] [Endorsed:] United States Court of Appeals, Second Circuit. Walter K. Warren v. United States of America, et al. Order. United States Court of Appeals, Second Circuit. Filed March 2, 1950. Alexander M. Bell, Clerk.

[fol. 170] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 171] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. 87

ORDER ALLOWING CERTIORARI—Filed October 9, 1950

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Petition For Writ of Certio-rari

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IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1949~~ 1950

No. ~~[illegible]~~ 87

WALTER K. WARREN,

Petitioner,

—against—

UNITED STATES OF AMERICA, as owner of the Steamship "ANNA HOWARD SHAW", and AMERICAN SOUTH AFRICAN LINE, INC., as operator of the Steamship "ANNA HOWARD SHAW",

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SAUL SPERLING
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New York City
Proctor for Petitioner

SAUL SPERLING
CHARLES A. ELLIS
Of Counsel

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No.

WALTER K. WARREN,

Petitioner,

—against—

UNITED STATES OF AMERICA, as owner of the Steamship "ANNA HOWARD SHAW", and AMERICAN SOUTH AFRICAN LINE, INC., as operator of the Steamship "ANNA HOWARD SHAW",

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Walter K. Warren, an American seaman, respectfully shows:

Summary Statement of Matter Involved

The petition is by an American seaman for a writ of certiorari to review a decree of the United States Court of Appeals for the Second Circuit, entered the 16th day of March, 1950, which, while reversing, pursuant to stipulation, the decree of the United States District Court for the Southern District of New York, which awarded to peti-

tioner-libellant maintenance in the sum of $644.16 and $36.00 costs against the respondent, American South African Line, Inc., upon the ground that under *Fink* v. *Shepard S.S. Co.*, 337 U. S. 810, decided pending said appeal, only the United States of America as owner could be held liable for maintenance, and while holding that the District Court had erred in dismissing for improper venue under the Suits in Admiralty Act, 46 U. S. C. Section 742, the libel against the respondent, United States of America, nevertheless affirmed "on the merits" the dismissal of the libel against the United States. This was put upon the grounds that petitioner was guilty of "gross negligence" barring his claim under the general maritime law and, with one judge dissenting, that such decision was not affected by the terms of the Shipowners Liability Convention of 1936 (54 Stat. 1693-1704).

The District Court had held on the merits that "If maintenance is to be denied here, the element of wilfulness or something akin to it must be found in one form or another"; that the only definition of "gross negligence" which will "fit into the pattern of the maintenance cases" is that of "a reckless disregard of safety", and that petitioner did not act in reckless disregard of his own safety nor was he grossly negligent.

Material Facts

Respondents offered no evidence with respect to the happening of the accident and rested at the close of petitioner's case.

Petitioner was a messman in the steward's department of the SS. ANNA HOWARD SHAW, on his first trip overseas, and had signed articles and joined the ship June 1, 1944 (R. 32). The ship was in port near Naples, Italy, and petitioner went ashore on shore leave pass issued by the

Captain (R. 33). Three men, the ship's carpenter, another messman and petitioner, walked about sightseeing for a time and then went into a dance hall, comparable to U. S. O. clubs, where American soldiers were entertained (R. 34-35, 65-66), five or six American soldiers being inside (R. 66), and outside which were a jeep and two American M. Ps., to whom he talked casually (R. 40, 65-66). People other than the Americans inside were well dressed and included one Italian woman schoolteacher who spoke English, and with whom he talked (R. 65), and a few others who could talk English (R. 81).

Petitioner enjoyed nature and scenery (R. 37). From one of the rooms large French doors were open onto a platform or ledge some three feet wide (R. 38, 68) and three or four sets of doors in length (R. 87), facing the sea and affording a beautiful view toward the Isle of Capri, and of the water hitting the stone below the platform and spraying (R. 66, 67, 37-8). He observed other people go over and onto the ledge and out to the edge and look, and so did he (R. 67, 88). He stood a few seconds, perhaps three to five minutes, before falling when a rod which he grasped gave way, and so surprised him that he lost his balance and fell (R. 68, 38). The rod did not extend to the floor, but appeared to be a hand-hold to hold on to (R. 70). He was thinking about the scenery out across the bay (R. 88, 68, 204). He "somehow or other" took hold of the rod, and as he did so and looked out a bit to see better the view, the rod let loose; surprised, he did not have time to recover himself, and fell below to his injury (R. 38-39).

He sustained a fracture of the distal end of the right tibia and fibula resulting in an osteomyelitis, which required the performing of an open reduction and which hospitalized him from October 30, 1944 to November 17, 1944 (R. 40) and from December 8, 1944 to December 21, 1944

(R. 43) and from February 27, 1945 to May 28, 1945 (R. 48) and which disabled him to July 1, 1945 (R. 55).

The Basis of This Court's Jurisdiction

The judgment sought to be reviewed was rendered by the United States Court of Appeals, Second Circuit, and is dated March 16, 1950.

It involves peculiarly Federal law and treaty provisions, affecting the most cherished rights of American seamen.

The treaty involved is the Shipowners Liability (Sick and Injured Seamen) Convention of 1936, 54 Stat. 1693-1704.

The jurisdiction of this Court is found in 28 U. S. Code, Section 1254(1) and 2101(c).

Questions Presented

A.

1. Are Clauses 1 and 2 of Article 2 of said Convention both self-operative, or both inoperative without legislation, or is clause 1 self-operative, and clause 2 inoperative without legislation or regulation thereunder?

2. Is Clause 1 of Article 4 of said Convention self-operative?

3. Are the words "wilful act, default or misbehavior" in Clause 2 of said Convention "used to describe conduct which will preclude recovery of maintenance," without national legislation thereunder, as stated by the majority of two judges in the Court of Appeals herein, or are they used to describe conduct in respect of which a government party to the Convention "may make" exceptions, by na-

tional legislation or regulation thereunder, and consequently inoperative to preclude recovery in the absence of legislation or regulation thereunder, as held by the dissenting Judge herein?

4. Whether said Convention, and in particular Clauses 1 and 2 respectively of Article 2 thereof, and Clause 1 of Article 4 thereof, are to be liberally or strictly construed; so as to promote and enlarge universally more uniform rights of recovery by sick or injured persons thereunder, or so as to restrict and narrow such rights and defeat universality through retaining, without legislation or regulation being made pursuant to the Convention, all the peculiar and differing restrictions previously formulated by judicial decisions or other laws or regulations in the various countries parties to the Convention.

B.

5. Whether the Court of Appeals, in holding Petitioner guilty of "gross negligence" and "grossly negligent," misused and misapplied said terms as signifying negligence with an epithet added, instead of wilful or vicious misconduct, and erred in overruling the District Court's decision that "If maintenance is to be denied here, the element of wilfulness or something akin to it must be found in one form or another."

6. Whether "gross negligence", as interpreted by the Court of Appeals, bars maintenance and cure (a) under the general maritime law, and (b) under the said Convention.

7. Whether Petitioner was guilty of venial negligence or of gross negligence; of momentary inadvertence and

lack of considered carefulness, or of wilful or vicious misconduct.

8. Whether indulgence of an appreciation for the aesthetic is to be judicially outlawed for seamen while on shore leave, by treating as wilful or gross misconduct barring maintenance and cure a momentary lack of studied carefulness, inadvertence or error of judgment, while momentarily entranced by a scene of extraordinary natural beauty, in contrast to treating similar negligence or worse conduct as venial where the rough amusements of seamen more familiar in Court decisions occur.

C.

9. Whether the Court of Appeals was justified in holding that maintenance and cure must be denied because to award maintenance and cure would be to make the shipowner an insurer of the seaman's safety.

Reasons for Allowance of the Writ

A.

1. Countless injuries occur to American seamen yearly which, whether or not involving claims for damages, result in claims and litigation for maintenance and cure. Claims involving injuries sustained while on shore leave or on the vessel are affected and probably controlled by the Shipowners Liability Convention of 1936, 54 Stat. 1693, ratified as a treaty and effective as to the United States and its citizens as of October 29, 1939. Yet, despite this Court's decisions in *O'Donnell* v. *Great Lakes Dredge & Dock Company*, 318 U. S. 36; *DeZon* v. *American President Lines*, 318 U. S. 660; *Aguilar* v. *Standard Oil Company*, and *Water-*

man Steamship Corporation v. *Jones*, 318 U. S. 724, and *Farrell* v. *United States*, 336 U. S. 511, all decided since the effective date of the Convention, and in all of which it is mentioned, no decision has yet clearly defined even the basic features of seamen's rights under the Convention. Lower Court judges, lawyers, claim adjusters, and especially poor seamen, are confused and uncertain as to seamen's rights. Claims go unadjusted or are litigated, with uncertain and conflicting results, which, if rights under the Convention were authoritatively determined and defined, would be adjusted speedily.

This uncertainty, confusion and difference of opinion, so costly to suffering and destitute seamen, is manifested herein by the facts that (1) the Court of Appeals differed below, two to one, on the simple point whether a "shall be liable" clause is self-operative, and a "may make exceptions" clause inoperative to create exceptions, in the absence of legislation or regulation thereunder; and (2) the United States as owner-respondent argued in its brief below opposite to the argument it made on this point in this Court as owner-respondent in *Farrell* v. *U. S.*, *supra*. (See its *Farrell* v. *U. S.* brief, at p. 18, footnote 8.)

2. The majority of two judges below wrote without assurance, confusing rather than clarifying the question, saying: "If it be assumed" that Clause 1 is self-executing, there "would seem" to be equal reason to make the "same assumption" as to Clause 2, "unless" etc.; "* * * it is conceivable" that Article 2 contemplated that Clause 1 should be self-executing and Clause 2 inoperative without Congressional legislation; "* * * if Clause 1 of Article 2 is self-executing so also is Clause 2. If, on the other hand, Clause 1 of Article 2 is not self-executing the Convention does not apply;" and "* * * our decision is not affected by the terms of the Convention" (179 Fed. 2d 923).

We submit that the decision of a maintenance and cure case cannot be "not affected by the terms of the Convention." The Convention by its terms "applies to all persons employed on board any vessel, other than a ship of war" (Article 1), and must be applied as controlling every case except where existing laws ensure "more favourable conditions than those provided by this Convention" (Article 12).

3. The decision is contrary to Article VI, Clause 2, of the Constitution making treaties, equally with laws, "the supreme law of the land." The Court should resort to the Convention for a rule of decision "as it would to a statute" (*Head Money Cases*, 112 U. S. 580, 598-599).

4. The decision directly conflicts with the concurring opinion of Chief Justice Stone in *Waterman Steamship Corporation* v. *Jones*, 318 U. S. 724, 738, and with the decision of the Court of Appeals, Fourth Circuit, in *Smith* v. *United States*, 167 Fed. 2d 550, 552. It probably conflicts also with *Farrell* v. *U. S.*, 336 U. S. 511.

5. It conflicts with the Presidential proclamation of the Convention "subject * * * to any exceptions * * * which may be made by legislation or regulations on the part of the United States of America" (54 Stat. 1704).

6. It conflicts with contemporary interpretation evidenced by the bill H. R. 6881 prepared and approved in conference by nine Federal Governmental Departments, Commissions and Boards, submitted by the President, introduced and approved by Committee, to implement the provisions of the Convention. Such bill contained no provisions to re-enact or make effective the "shall be liable" Clauses 1 of Articles 2 and 4 of the Convention; but contained in §4 of the bill a provision that "In accordance with

the provisions of the sections 2 and 3 of Article 2 of the convention, the shipowner is hereby excepted" with respect to specified liabilities. (See comparative texts of Covention and Bill, in H. R. Report No. 1328, 76th Congress, 1st Session, pp. 38-39.)

Such bill never became a law. The bill represented, however, as respects what matters require legislation to be operative, the views of the Maritime Commission, Employees Compensation Commission, Social Security Board, Maritime Labor Board, Department of Labor, Department of Justice, Treasury Department, Commerce Department and State Department, all represented at a series of conferences at which it was drafted (Department of Commerce letter, H. R. Report 1328, *supra*, p. 49), and of the President; and was approved, without expression of views on this point, by a House Committee.

7. It conflicts with contemporary opinions, given by letters in connection with the drafting and introduction of H. R. 6881, of the Secretary of State (H. R. Report 1328, *supra*, pp. 6, 7); Secretary of Commerce and Acting Solicitor (*Id.*, p. 16); 1937 and 1939 Chairmen of the Maritime Commission (*Id.*, pp. 19, 31, 32) and Secretary of Labor (*Id.*, pp. 48-49) that Clause 1 of Article 2 is self-executing, establishes liability and needs no legislation, but that Clause 2 of Article 2 requires that if exception is to be made "it is necessary to do so affirmatively by statute" (*Id.*, p. 7).

These evidences of executive construction are entitled to great if not controlling weight (*Factor* v. *Laubenheimer*, 290 U. S. 276, 295-298; *Charlton* v. *Kelly*, 229 U. S. 447, 468; *Sullivan* v. *Kidd*, 254 U. S. 433, 442).

8. It ignores and is contrary to the manifest opposite meanings, as respects operativeness, of the terms "shall be

liable" in Clause 1, and "may make exceptions" in Clause 2, of Article 2. *Cf.* Clauses 1 and 2 of Article 1.

9. It conflicts with and renders meaningless the provision of Article 12, that nothing in the Convention shall affect any law, award, custom or agreement "which ensures more favourable conditions than those provided by this Convention;" and the effect given thereto in *O'Donnell* v. *Great Lakes Dredge & Dock Company*, 318 U. S. 36, 42; Cf. *Farrell* v. *U. S.*, 336 U. S. 511. The alleged pre-Convention test applied below being less favorable than the "controlling" (*Farrell* v. *U. S.*, *supra*) self-operative Convention test that the injury merely occur "between the date specified in the articles of agreement for reporting for duty and the termination of the engagement" (Article 2, Clause 1), the latter alone is controlling in absence of legislation making the former effective as an exception, even were this permissible in view of the word "wilful" in Article 2, Clause 2(b).

10. It conflicts with decisions holding that welfare statutes made for the protection, benefit or aid of seamen are to be liberally construed to carry out their full purpose (*Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 248; *Cosmopolitan Shipping Co.* v. *McAllister*, 337 U. S. 783; *Socony-Vacuum Oil Co.* v. *Smith*, 305 U. S. 424, 431; *Warner* v. *Goltra*, 293 U. S. 155, 156, 162; *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367, 375; *Jamison* v. *Encarnacion*, 281 U. S. 635, 640).

The Convention should be construed in the same liberal manner (*Bacardi Corp.* v. *Domenech*, 311 U. S. 150, 163; *Asakura* v. *Seattle*, 265 U. S. 332, 342; *Hauenstein* v. *Lynham*, 100 U. S. 483, 487).

11. It renders the Convention futile and meaningless, defeats its purposes, defeats universality and defeats the peculiarly American purpose to raise foreign standards and costs with our own. "The purpose of the convention was (1) to aid seamen and (2) to aid in the equalization of standards affecting seamen throughout the world" (Secretary Hull, H. R. Report 1328, *supra*, pp. 7, 9, 10) and to aid in equalizing operating costs (*Id.*, p. 10). See also, Secretary Perkins (*Id.*, pp. 17, 48); Maritime Commission (*Id.*, p. 31). If Clauses 1 of Articles 2 and 4 are inoperative here, or if the clauses permitting exceptions are self operative here, and interpretable to retain unaltered all exceptions and defenses under ancient laws, customs, codes and judicial decisions, then they must also have this effect in foreign countries parties to the Convention; particularly with this decision as a precedent.

B.

12. Whereas both the Convention and *Aguilar* v. *Standard Oil Co.*, 318 U. S. 724, sweep aside contentious defenses to maintenance and cure, which would limit its scope or hamper its simplicity of enforcement; the District Court and Court of Appeals both have treated the *Aguilar* decision as broadening or introducing new defenses, which both Courts call "gross negligence," agree they cannot define, but upon which they differ as to whether petitioner was guilty of "gross negligence."

The District Court held "the element of wilfulness" essential but absent.

The Court of Appeals held that it was necessary under *Aguilar* to assess "what degree of negligence" the seaman's conduct represented and that "the care which Warren took was very slight," represented "gross negligence" and was a bar (179 F. 2d 922).

Whether such a defense exists under *Aguilar* and the Convention is vitally important to seamen and shipowner.

13. The decision violates the Convention which, by Clause 1 of Article 2, makes the sole test for maintenance and cure, that the injury occur "between the date specified in the articles of agreement for reporting for duty and the termination of the engagement;" or, if Clause 2 is equally self-executing, requires that the "act, default or misbehavior" be "wilful," in order to except liability. The Convention does not mention "gross negligence."

14. The decision conflicts with the following decisions holding that "gross negligence" is simply negligence with an epithet added; and which, to have any other meaning, requires an evil motive of wilfulness, viciousness or fraud, in contrast to and completely distinct from negligence: *Milwaukee & St. Paul Ry. Co.* v. *Arms*, 91 U. S. 489, 493-494; *Western Union Telegraph Co.* v. *Eyser*, 91 U. S. 495, 496; *Western Union Telegraph Co.* v. *Priester*, 276 U. S. 252, 259; *New York Central Railroad Company* v. *Lockwood*, 17 Wall [84 U. S.] 357, 382-383; *The Steamboat New World* v. *King*, 16 How. [57 U. S.] 469, 474-475; *Westre* v. *Chicago M. & St. P. Ry. Co.*, C. C. A. 8, 2 F. 2d 227, 229; *Purple* v. *Union Pacific R. Co.*, C. C. A. 8, 114 Fed. 123, 130; *Oregon Co.* v. *Roe*, C. C. A. 9, 176 Fed. 715, 718; *Kelly* v. *Malott*, C. C. A. 7, 135 Fed. 74, 76; *Western Union Telegraph Co.* v. *Catlett*, C. C. A. 4, 177 Fed. 71, 74-75; *Hewlett* v. *Schadel*, C. C. A. 4, 68 F. 2d 502, 505-506; *Mayer* v. *Puryear*, C. C. A. 4, 115 F. 2d 675, 678; *Perkins* v. *New York Central R.R. Co.*, 24 N. Y. 196, 206-207; *Hanover Fire Ins. Co.* v. *Merchants' Transp. Co.*, C. C. A. 9, 15 F. 2d 946, 948, certiorari denied 273 U. S. 758; *Sorenson* v. *Boston Ins. Co.*, C. C. A. 4, 20 F. 2d 640, 643, certiorari denied 275 U. S.

555; *Standard Marine Ins. Co.* v. *Nome Beach Lighterage & Transportation Co.*, C. C. A. 9, 133 Fed. 636, 647-648.

Apparently, only where statutorily used to indicate "degree" is it so treated (*Conway* v. *O'Brien*, 312 U. S. 492; *Mayer* v. *Puryear*, *supra*).

15. It unwarrantably introduces a Vermont statutory "incommensurable subject matter" concept of "gross negligence" (*Moisan* v. *Loftus*, C. C. A. 2, 178 Fed. 2d 148, 149, cited by the Court below at 179 F. 2d 921), and tends to destroy the historic inclusiveness and simplicity of the right to maintenance and cure which enabled it to be "understood and administered without technical considerations", with "few exceptions or conditions to stir contentions, cause delays, and invite litigations" (*Farrell* v. *U. S.*, *supra*).

16. The decision is inconsistent in holding that "Before" the *Aguilar* case it was not necessary but "Since *Aguilar*" it is necessary "to assess a libellant's degree of care" and "what degree of negligence" his conduct involved, and that "the pre-*Aguilar* cases are of little assistance"; and in yet citing, to justify the term "gross negligence," *Peterson* v. *The Chandos*, D. C. Or., 6 Sawy. 544, 4 F. 645; *The J. F. Card*, D. C. Mich., 43 F. 92; *The Ben Flint*, D. C. Wis., 1 Abb. (U. S.) 126, 1 Biss. 562, 3 Fed. Cas. No. 1299, cited in *Aguilar*; and *Jackson* v. *Pittsburgh S. S. Co.*, C. C. A. 6, 131 F. 2d 668.

17. The decision misconstrues and conflicts with *Peterson* v. *The Chandos*, *supra*; and *The Ben Flint*, *supra*, which use the term "gross negligence" with other expressions showing that wilfulness rather than negligence was meant; i.e.: *Peterson*: "the fault must be some positively vicious conduct, such as gross negligence or wilful disobedience of orders" (4 Fed. 651; cf. p. 647). *The Ben Flint*: "those gross faults and vices which affect or prejudice the ships

service * * * vicious or unjustifiable conduct, such as gross negligence operating in the nature of a fraud upon the owners, willful disobedience to orders, and persistent neglect of duty" (1 Abb. (U. S.) 130, 131).

18. It conflicts with the term as used in other early leading maintenance and cure decisions, i.e., Story, *J.*, in *Reed* v. *Canfield*, C. C. Mass., 1 Sumn. 195, 20 Fed. Case 426, No. 11,641: "gross negligence, that is, that sort of negligence, which the law denominates *crassa negligentia*, and which would operate somewhat like a fraud upon the owners" (1 Sumn. 206). *Walton* v. *The Neptune*, D. C. Pa., 1 Pet. Adm. 142: "vicious or unjustifiable conduct" (1 Pet. Adm. 151). Brown, *J.*, in *The City of Alexandria*, D. C. E. D. N. Y. 17 Fed. 390, 395: "his own gross and willful misconduct." Deady, *J.*, in *The City of Carlisle*, D. C. Or., 39 Fed. 807, 813: "The fault which will forfeit this right must be some positively vicious conduct, such as gross negligence or willful disobedience of orders."

19. It conflicts with this Court's decisions in *Aguilar* v. *Standard Oil Co., supra; Farrell* v. *U. S.*, 336 U. S. 511, and *The Osceola*, 189 U. S. 158, requiring a "wilful" element, i.e. *Aguilar*: "Only some wilful misbehavior or deliberate act of indiscretion suffices to deprive the seaman of his protection * * * The traditional instances are venereal disease and injuries received as a result of intoxication" (318 U. S. 731). *Farrell*: "The seaman could forfeit the right only by conduct, whose wrongful quality even simple men of the calling would recognize—insubordination, disobedience to orders and gross misconduct." *The Osceola*: "the sailor's willful misconduct" (189 U. S. 170).

20. It conflicts on the merits with decisions of other circuits, viz., *Ellis* v. *American Hawaiian S.S. Co.*, C. C. A. 9,

165 F. 2d 999; *Smith* v. *United States*, C. C. A. 4, 167 F. 2d 550; *Nowery* v. *Smith*, C. C. A. 3, 161 F. 2d 732, affirming, for reasons stated in, *Nowery* v. *Smith*, D. C. E. D. Pa., 69 F. Supp. 755; *Sundberg* v. *Washington Fish & Oyster Co.*, C. C. A. 9, 138 F. 2d 801; with *Peterson* v. *The Chandos*, 6 Sawy. 544, 4 F. 645; and we believe with the Second Circuit Court's own decisions in *Kable* v. *United States*, C. C. A. 2, 169 F. 2d 90, and *Reck* v. *Pacific-Atlantic S.S. Co.*, C. C. A. 2, 180 F. 2d, 866.

C.

21. The ruling that petitioner could not recover because recovery would make the ship "an insurer of his safety" (179 F. 2d 922) conflicts directly with the Fourth Circuit decision in *Smith* v. *United States*, C. C. A 4, 167 F. 2d 550, at 552; and, we believe, with *Aguilar* v. *Standard Oil Co.*, 318 U. S. 724, and with the Convention. It misapplies a rule applicable to indemnity but not to maintenance and cure, as shown by the Court's own decision in *Muruaga* v. *United States*, C. C. A. 2, 172 F. 2d 318, 320-321.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1949

WALTER K. WARREN,

Petitioner,

—against—

UNITED STATES OF AMERICA, As owner of the Steamship "ANNA HOWARD SHAW," and AMERICAN SOUTH AFRICAN LINE, INC., as operator of the Steamship "ANNA HOWARD SHAW,"

Respondents.

BRIEF IN SUPPORT OF FOREGOING PETITION FOR WRIT OF CERTIORARI

Statement and summary of the case, including the facts, are set forth in the Petition, pp. 1-4.

Opinions Delivered Below

The two opinions delivered in the District Court are published at 75 F. Supp. 210 and 76 F. Supp. 735. The three opinions delivered in the Court of Appeals are published at 179 F. 2d 919-924.

Grounds for Jurisdiction

Grounds for Jurisdiction have been stated in detail in Reasons for Allowance of the Writ, Petition, p. 6 *et seq.*

They include important questions, as to seamen's rights to maintenance and cure, and negligence as a defense thereto.

The case presents, apparently, for the first time by Petition, important questions as to the applicability, meaning and effect of the Shipowners Liability (Sick and Injured Seamen) Convention of 1936, 54 Stat. 1693-1704; whether specific provisions thereof are self-operative or inoperative in the absence of legislation thereunder; and whether, either under the Convention or under the general maritime law, negligence may be treated as a bar to maintenance and cure by an Appellate Court calling it "gross negligence," according to an unrelated Vermont statutory concept of "degrees" of negligence, and overruling the trial Court's decision that the "element of wilfulness" is essential to a defense, and that Petitioner was not guilty of conduct such as to bar his claim.

The Convention (Treaty) Provisions Involved

The treaty involved is the Shipowners Liability (Sick and Injured Seamen) Convention of 1936, 54 Stat. 1693-1704. The specific provisions to be construed and applied are the provisions of Clauses 1 and 2 of Article 2, and Clauses 1, 2 and 3 of Article 4, as follows:

"ARTICLE 2

"1. The shipowner shall be liable in respect of:

(a) sickness and injury occurring between the date specified in the articles of agreement for reporting for duty and the termination of the engagement;

"2. Provided that national laws or regulations may make exceptions in respect of:

(a) injury incurred otherwise than in the service of the ship;

(b) injury or sickness due to the wilful act, default or misbehavior of the sick, injured or deceased person;

* * * * *

"ARTICLE 4

"1. The shipowner shall be liable to defray the expenses of medical care and maintenance until the sick or injured person has been cured, or until the sickness or incapacity has been declared of a permanent character.

"2. Provided that national laws or regulations may limit the liability * * * to a period * * * not * * * less than sixteen weeks * * *

"3. Provided also that, if there is in force in the territory in which the vessel is registered a scheme applying to seamen of compulsory sickness insurance, compulsory accident insurance or workmen's compensation for accidents, national laws or regulations may provide:

(a) that a shipowner shall cease to be liable * * * from the time at which that person becomes entitled to medical benefits under the * * * scheme;

(b) that the shipowner shall cease to be liable from the time prescribed by law for the grant of medical benefits under the * * * schemes, even when * * * not covered by the scheme in question, unless he is excluded from the scheme by * * * restriction which affects particularly foreign workers * * *"

Assignments of Error

The Court of Appeals, Second Circuit, erred

A.

1. In holding that the decision of this maintenance and cure case is not affected by the terms of the Convention.

2. In holding that "shall be liable" provisions and "may make exceptions" provisions of the Convention are equally inoperative or equally self-operative, without legislation.

3. In not holding that Clauses 1 of Articles 2 and 4 of the Convention are self-operative, and Clause 2 of Article 2 inoperative, without legislation or regulations thereunder.

4. In not holding that Petitioner is entitled to maintenance and cure, under Clause 1 of Article 2 of the Convention, because his injury occurred "between the date specified in the articles of agreement for reporting for duty and the termination of the engagement."

B.

5. In holding that negligence of Petitioner barred his claim for maintenance and cure.

6. In holding that Petitioner was guilty of "gross negligence" which barred his claim for maintenance and cure.

7. In holding that a seaman's right to maintenance and cure depends upon his "degree of care" or "degree of negligence."

8. In applying in a maintenance and cure case an unrelated State's statutory concept of "degrees of negligence."

9. In failing to hold that (i) the words "wilful act, default or misbehavior" in Clause 2(b) of Article 2 of the Convention, and (ii) the general maritime law, do not allow as a defense to maintenance and cure "gross negligence" as interpreted by the Court of Appeals.

C.

10. In holding that Petitioner is not entitled to maintenance and cure because to allow it would make the ship an insurer of his safety.

POINT I

Petitioner is entitled to maintenance and cure under the Convention. Clauses 1 of Articles 2 and 4 are self-operative, and Clause 2 of Article 2 inoperative, without legislation or regulations thereunder.

The Convention was duly adopted, ratified and proclaimed as a treaty, effective October 29, 1939 (54 Stat. 1693-1704; *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U. S. 36, 42; *Farrell* v. *United States*, 336 U. S. 511, 517).

As a treaty it is to be liberally construed to accomplish its full purposes (*Bacardi Corp.* v. *Domenech*, 311 U. S. 150, 163; *Asakura* v. *Seattle*, 265 U. S. 332, 342; *Hauenstein* v. *Lynham*, 100 U. S. 483, 487).

Its purposes were "(1) to aid seamen and (2) to aid in the equalization of standards affecting seamen throughout the world" (Secretary Hull, H. R. Report 1328, 76th Congress, 1st Session, pp. 3, 9, 10).

There is applicable also, therefore, the principle that welfare statutes made for the protection, benefit or aid of seamen are to be liberally construed to carry out their full purpose (*Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 248; *Cosmopolitan Shipping Co.* v. *McAllister*, 337 U. S. 783; *Socony-Vacuum Oil Co.* v. *Smith*, 305 U. S. 424, 431; *Warner* v. *Goltra*, 293 U. S. 155, 156, 162; *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367, 375; *Jamison* v. *Encarnacion*, 281 U. S. 635, 640).

Where its provisions are applicable, the Court should resort to the Convention for a rule of decision "as it would to a statute" (*Head Money Cases*, 112 U. S. 580, 598-599).

As pointed out by Secretary Hull, "Many of the provisions of the Convention are considered to be self-executing, and there would appear to be no need to repeat verbatim the language of the Convention in a statute to make it effective" (H. R. Report 1328, *supra*, p. 6). This is so as to the "shall be liable" clauses, such as Clauses 1 of Articles 2 and 4.

Secretary Hull specifically held that Clause 1 of Article 2 is self-executing, and a Bill prepared by nine Federal Departments, Commissions and Boards so treated it. "Paragraph 1 of Article 2 of the Convention was not incorporated in the bill because of the belief (1) that it is self-executing in that it establishes liability, although no definite amount is provided" (H. R. Report 1328, *supra*, p. 6, *cf.*, the provisions of the Bill containing no provision comparable to Clause 1 of Article 2; *Id*, p. 38).

What could a statute add to the effectiveness of Clause 1 by reenacting verbatim its provisions, inasmuch as the Convention is, equally with a statute, itself "the supreme law of the land"? (U. S. Constitution, Article VI, Clause 2). Certainly a statute reading as does Clause 1 of Article 2 of the Convention would be applied and given full effect as measuring alone the conditions of liability, in the absence of any effective exceptions.

By contrast, as to the Convention provisions that National laws or regulations "may make exceptions" in respect of specifically limited matters, Secretary Hull said: "Some of the articles of the Convention, however, after stating the general rule, provide that national laws may make exceptions thereto. If this Government is to be excepted from certain obligations of the Convention or alterations in our present practice, it is necessary to do so affirmatively by statute" (H. R. Report 1328, *supra*, p. 6). The Bill accordingly contained a Sec. 4, relating to Clause 2 of Article 2 of the Convention; and whereas the Convention clause provided that national laws or regulations "may make" exceptions, Sec. 4 of the Bill provided that "In accordance with" such Convention provisions, the shipowner "is hereby excepted from the terms of the Convention" in respect to "liability for" stated injuries. Significantly, it omitted the word "default" from the Convention phrase "willful act, default or misbehaviour" (H. R. Report 1328, *supra*, p. 39).

The fact that the Bill was not enacted is indicative that Congress refused to make any exceptions.

These and the other indications of similar executive construction referred to in the Petition herein are entitled to great if not controlling weight (*Factor* v. *Laubenheimer*, 290 U. S. 276, 295-298; *Charlton* v. *Kelly*, 229 U. S. 447, 468; *Sullivan* v. *Kidd*, 254 U. S. 433, 442).

In *Farrell* v. *United States*, 336 U. S. 511, respecting Clause 1 of Article 4, this Court said that it "would seem controlling" (336 U. S. 517). The United States, as respondent in that case, moreover, argued in its brief, p. 18, footnote 8, that the "provisions are self-operative."

In *Waterman Steamship Corporation* v. *Jones*, 318 U. S. 724, at 738, Chief Justice Stone concurred specifically "on the ground that the recovery was authorized by the Shipowners Liability Convention, 54 Stat. 1695, which

became effective before the date of respondents injury" and because:

> "He is of opinion that Article 2, Clause 1 of the treaty authorizing the recovery is self-executing, and that the exceptions permitted by Clause 2 are not operative in the absence of Congressional legislation giving them effect" (318 U. S. 738).

In *Smith* v. *United States*, C. C. A. 4, 167 F. 2d, 550, 552, the Fourth Circuit specifically ruled that the language of Clause 1 that liability shall exist for injury occurring between the date for reporting for duty and termination of the voyage "manifestly covers shore leave as well as ship duty" and that, as respects the provision that national laws or regulations "may make exceptions" that "No law or regulation of this country makes any such exception; * * *"

The Convention obviously was intended to and does establish a coverage for the period of relationship, with no exceptions whatsoever unless specifically and separately made by legislation or regulation within the limits authorized by the Convention.

The Convention itself avoided any qualification which would be "deceptively simple and litigiously prolific" (*Cardillo* v. *Liberty Mut. Ins. Co.*, 330 U. S. 469, 479). Its "words leave no possible room for reading in an implied exception" (*Id.* p. 475). Clause 3(a) and (b) of Article 4, that national laws or regulations may provide that a shipowner shall "cease" to be liable, show that otherwise he is liable.

The question is one of tremendous importance to seamen. Moreover, the decision of this Court will be a precedent for all countries parties to this or other Conventions similarly worded. The Court of Appeals decision herein will be one disastrous to this or any similar Convention, if not reversed.

POINT II

The decision below violates both the Convention and the maritime law, and the decisions of this Court and courts of other circuits, as well as its own prior decisions, in holding that negligence of petitioner herein was "gross negligence" and a bar to maintenance and cure.

1. The Convention makes no provisions as to negligence, or "gross negligence". If Clause 1 of Article 2 is self-operative, but Clause 2 is not, then there is no exception under the Convention. If, however, Clause 2 be held equally self-operative, it allows of no exception covering negligence or "gross negligence", but only of causative "act, default or misbehavior" which is "wilful".

2. This, we submit, is equally true of our maritime law, and is the sole basis for the opinion of Secretary Hull and other Heads of Departments, Commissions and Boards who believed the Convention test was in accord with our maritime law. The errors of the Court of Appeals herein on this point are in applying to maintenance and cure, under the maritime law, an unwarranted and unworkable State statutory theory of "degree of negligence", and in finding Petitioner guilty of anything other than mere negligence.

3. After reaching back to borrow the term "gross negligence" from dicta in three District Court decisions rendered over half a century before this Court's decision in *Aguilar* v. *Standard Oil Company*, 318 U. S. 724, the Court of Appeals has then sought the meaning of the borrowed term, not from the old decisions from which borrowed (*Peterson* v. *The Chandos* (1880), D. C. Or., 6 Sawy., 544, 4 F. 645; *The J. F. Card* (1890), D. C. Mich., 43 F. 92; *The*

Ben Flint (1867), D. C. Wisc., 1 Abb. (U. S.) 126, 1 Biss 562, 3 Fed. Cas. No. 1299), but from a state (Vermont) statutory concept which the Court had recently examined in *Moisan* v. *Loftus*, C. C. A. 2, 178 F. 2d, 148, cited below at 179 F. 2d, 921.

It rejected the "wilful" and "vicious" element associated with the term as used in the *Peterson* and *The Ben Flint* decisions it relied on for using the term here at all and the "wilful" element in Clause 2 of Article 2 of the Convention, and applied instead the Vermont statutory "degree" concept which in *Moisan* v. *Loftus, supra*, it had designated as an "incommensurable subject matter" (178 F. 2d, 149).

All this, it attributed to *Aguilar;* saying as to this point of the borrowed term's meaning that the "pre-*Aguilar* cases are of little assistance in guiding us to a correct decision here" (179 F. 2d, 922), because "Before" *Aguilar* "it was not necessary to assess a libellant's degree of care when his injury occurred during a period of relaxation afloat or ashore, for he was barred from recovery"* (179 F. 2d, 921), but that "Since *Aguilar*" the "assessment of what degree of negligence" should be ascribed to an injured seaman's conduct had been "squarely presented."

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* For its theory that "Before" *Aguilar* recovery was barred, the Court cited *Meyer* v. *Dollar S.S. Lines*, C. C. A. 9, 49 F. 2d 1002;—which this Court specifically disapproved in *Aguilar* as consonant "neither with the liberality which Courts of Admiralty traditionally have displayed toward seamen who are their wards nor with the dictates of sound maritime policy" (318 U. S. 732, note 15).

Thus, contrary to *Aguilar*, the decision rendered below treats the pre-*Aguilar* law as being, not as ruled in *Aguilar*, but as per *Meyer* which *Aguilar* disapproved; and treats *Aguilar* as representing, in effect, legislative repeal of the *Meyer* decision, and as creating new rights not existing "Before" but only "Since" *Aguilar*. Perhaps this is why, despite borrowing the words "gross negligence" from old District Court dicta, it treats of the term, not as involving the "wilful" or "vicious" meaning for which those source decisions used it, but the meaning which the terms signified in the State statute it had recently examined in *Moisan* v. *Loftus supra*.

4. The tremendous impact of this decision upon the maritime law of maintenance and cure, and the Convention, and its disruptive effect thereon, unless reviewed and reversed, is apparent from comparing both the lower Court's comments in *Moisan* v. *Loftus, supra,* and this Court's comments in *Conway* v. *O'Brien,* 312 U. S. 492 (respecting the same Vermont statute), with this Court's comments in *Farrell* v. *United States,* 336 U. S. 511, and *Aguilar* v. *Standard Oil Co., supra,* respecting maintenance and cure.

In *Conway* v. *O'Brien* this Court said of the Vermont statutory "gross negligence" definitions that:

> "The application creates the difficulties * * * Admittedly there are instances among the Vermont cases which might be logically cited to support a refusal to submit this case. About as many are upon the other side" (312 U. S. 495-496).

In *Moisan* v. *Loftus,* the Court of Appeals composed of the same judges who sat herein, said:

> "The difficulties are in applying the rule * * *; they arise from the necessity of applying a quantitative test to an incommensurable subject-matter; and the same difficulties inhere in the concept of "ordinary" negligence * * *
>
> "In conclusion we cannot help observing that, not only are the inherent uncertainties great in applying such a formula, but that they are greater for the Court of another jurisdiction, which cannot have the assurance that comes to those who have themselves framed the terms which they later construe" (178 F. 2d 149, 150).

Yet such is the concept which the same Court sitting herein, and citing *Moisan* v. *Loftus* to illustrate it, have ruled that *Aguilar* itself introduced, and that the Convention allows!

This ruling makes a seaman's right to maintenance and cure depend upon "inherent uncertainties great in applying such a formula" (*Moisan* v. *Loftus, supra*), and upon which Court, the trial Court, intermediate Appellate Court or final Appellate Court chooses to say it fits the conduct in a given case. It is a formula which this Court said in *Conway* v. *O'Brien, supra*, produces in equal number decisions for or against recovery.

It makes every case of maintenance and cure one for contest, litigation and appeal.

By contrast, in *Farrell* v. *United States*, 336 U. S. 511, at 516, this Court said of maintenance and cure:

> "It has been the merit of the seaman's right to maintenance and cure that it is so inclusive as to be relatively simple, and can be understood and administered without technical considerations. It has few exceptions or conditions to stir contentions, cause delays, and invite litigations. The seaman could forfeit the right only by conduct whose wrongful quality even simple men of the calling would recognize—insubordination, disobedience to orders, and gross misconduct" (336 U. S. 516).

In *Aguilar* v. *Standard Oil Co., supra*, this Court said:

> "Certainly the nature and foundations of the liability require that it be not narrowly confined or whittled down by restrictive and artificial distinctions defeating its broad and beneficial purposes. If leeway is to be given in either direction, all the considerations which

brought the liability into being dictate it should be in the sailor's behalf" (318 U. S. 735-736).

In like spirit the Convention provides, in Article 9 that:

> "National laws or regulations shall make provision for securing the rapid and inexpensive settlement of disputes concerning the liability of the Shipowner under this Convention."

and, in Article 11, that

> "This Convention and national laws or regulations relating to benefits under this Convention shall be so interpreted and enforced as to secure equality of treatment to all seamen irrespective of nationality, domicile or race."

5. We have found no case wherein this Court has ever held that negligence, however qualified by epithet, bars maintenance and cure; rather, it has held consistently that negligence is not a bar. Despite the use in a number of old lower court maritime decisions of the term "gross negligence"—usually as dicta in cases granting recoveries—this Court appears carefully to have avoided use of the term in maintenance and cure cases. The *Aguilar* and *Farrell* decisions, and *The Osceola*, 189 U. S. 158, each use formulae involving a "wilful" element. (See No. 19 of Reasons for Allowance of the Writ, Petition, p. 14 herein.)

This Court, moreover, has ruled often, as have the Courts of Appeals of other Circuits, that the term "gross negligence" is a confusing, troublesome and litigation-breeding misnomer, signifying merely negligence with an "epithet" added. (See cases cited in No. 14 of Reasons for Allowance of the Writ, Petition, pp. 12-13 herein.) When it par-

takes of another meaning, it involves "wilfulness" and not negligence at all (*Idem*).

In the one sense—merely negligence with an "epithet"—it cannot be allowed as a bar to maintenance and cure without violating this Court's consistent rulings that negligence does not bar maintenance and cure. (See *Farrell* and *Aguilar* cases, *supra*, and cases there cited.)

In the other sense—involving a "wilful" or "vicious" element—the term can serve no useful purpose as a tautological addendum to the consistently used formula "wilful misconduct" or the Convention term "wilful act, default or misbehavior" (Art. 2, Cl. 2(b)).

6. In the older maritime decisions where the term "gross negligence" is used, almost invariably it is with qualifying or accompanying words signifying a "wilful" or "vicious" conduct meaning. (See cases cited and terms quoted therefrom in Nos. 17 and 18 of Reasons for Allowance of the Writ, Petition herein, pp. 13-14.)

Notably, it was *The Ben Flint, supra*, which was singled out and cited separately for the "Only" bar expression in *Aguilar* v. *Standard Oil Co., supra*, at 318 U. S. 731, third sentence. And *The Ben Flint* expresses the formula as "vicious or unjustifiable conduct, such as gross negligence operating in the nature of a fraud upon the owners, willful disobedience to orders and persistent neglect of duty" (1 Abb. (U. S.) 131).

This, it will be noted, is precisely the sort of conduct which is distinguished even in *Conway* v. *O'Brien, supra*, as "equivalent to a wilful and intentional wrong" (312 U. S. 495).

The formulae in *Peterson* v. *The Chandos, supra*, and in *The City of Carlisle*, D. C. Or., 39 Fed. 807, 813 were "some positively vicious conduct, such as gross negligence or will-

ful disobedience of orders." It needs no physical transposition of these or of the formula of *The Ben Flint* to perceive that, as respects "gross negligence" the expressions are the same when stated: "gross negligence, such as some positively vicious conduct" or "gross negligence, such as vicious or unjustifiable conduct."

Judge Story's formula in *Reed* v. *Canfield,* C. C. Mass., 1 Sumn. 195, 20 Fed. Cas. 426, No. 11,641 was very specific as to the wilful or "fraud" element, i.e.: "gross negligence, that is, that sort of negligence, which the law denominates *crassa negligentia,* and which would operate somewhat like a fraud upon the owners" (1 Sumn. 206).

In short, the writers of these old decisions never conceived of establishing as a bar to maintenance and cure some "degree" of merely negligent acts, as distinct from conduct that was wilful, vicious or fraudulent.

7. The grounds for forfeitures, penalties and punishments specified in 46 U. S. C. Sections 701, 704 and 710, indeed, are closely parallel to those recognized in the old decisions as bars to maintenance and cure and wages. In *The Superior,* 22 Fed. 927, 928, Judge Coxe, allowing recovery of wages and transportation by a discharged woman seaman, despite conduct "reprehensible in the extreme", said, after citing some of these forfeiture grounds:

> "But lesser offenses are looked upon as venial, and are leniently dealt with in the admiralty courts."

8. The decision, moreover, is contrary to and conflicts with those cited in No. 20 of Reasons for Allowance of the Writ (Petition, pp. 14-15), including decisions of the Ninth, Fourth and Third Circuits.

Ellis v. *American Hawaiian S.S. Co.,* C. C. A. 9, 165 F. 2d 999, cited by the Court below, as having "squarely pre-

sented" and decided the same question, is, we submit, opposite, both as to theory and result. It used the expressions "wilful misconduct or gross negligence" and "wilful nor gross misconduct". A seaman on shore leave dived three times into a pool having in it only four feet depth of water, and struck his head on the bottom on the third dive. The Court reversed a dismissal and remanded the case for determination of the seaman's wages and maintenance and cure for his injuries.

The distinction of the *Ellis* case on the merits made by the Court in relying on it below is tenuous and would require that for precisely the same dive causing precisely the same injury the shipowner would be exonerated if it were the first, or even possibly the second, rather than the third negligent dive. Moreover, even the successful negotiation by Ellis of two prior dives is paralleled here by the fact that Petitioner had safely looked from the platform for from three to five minutes before falling (R. p. 68). *Cf.* subsequent decision on remand *Ellis* v. *American Hawaiian S.S. Co.*, D. C. S. D. Cal., 77 Fed. Supp. 836, 837.

The Fourth Circuit Court of Appeals in *Smith* v. *United States*, C. C. A. 4, 167 Fed. 2d. 550, held that the District Court erred in disallowing (74 F. Supp. 275) maintenance and cure where a seaman broke his ankle while on shore leave at a friend's cottage.

The Third Circuit Court of Appeals, in *Nowery* v. *Smith*, C. C. A. 3, 161 F. 2d 732, affirmed an award where a seaman was injured in a fight in a barroom.

The Ninth Circuit Court of Appeals in *Sundberg* v. *Washington Fish & Oyster Co.*, C. C. A. 9, 138 F. 2d 801 held the District Court erred in denying an award where a negligent seaman while off duty was hit by a bullet shot by another seaman at sea lions.

As respects the very points of appreciable danger and lack of considered carefulness or "slight care", which the Court

of Appeals called "gross negligence" herein, such as to bar maintenance and cure, and even the distance of the fall, in two stages, Peterson's fall in *Peterson* v. *The Chandos, supra*, decided in 1880, was either identically parallel, or involved less carefulness than here. Peterson, "a man above the average weight," went out upon a mere rope crane line, known to chafe and wear quickly from swaying on the stays, so as to last only a day or so (4 F. 648), and either stood or sat upon it "without other hold or support" (4 F. 647), and "without any precaution against its breaking, or observation as to its then condition" (4 F. 647-648), and fell first 30 feet until he struck a bottom-up boat and then 10 feet further to the deck (4 F. 647), when the rope gave way. The Court held that his negligence and failure to exercise "ordinary care and prudence" barred any claim for damages (4 F. 649); but that "The libellant, notwithstanding his want of caution in going upon the crane line, was clearly entitled to be cared for at the expense of the ship" (4 F. 651).

This Court has held in *Aguilar*, and the Convention certainly means, that the difference that the one injury occurred on ship and the other on shore leave does not change the seaman's right. Moreover, already the Court of Appeals decision herein is being cited by adjusters and attorneys for shipowners for the argument that negligence, by calling it "gross negligence", bars maintenance and cure whether the injury be on ship or ashore. *Peterson* v. *The Chandos*, cited with approval by this Court in *Aguilar*, and the decision of the Court of Appeals herein cannot both be sound, in the light of the *Aguilar* decision and the Convention.

In *Kable* v. *United States*, C. C. A. 2, 169 F. 2d 90, Judges Augustus N. Hand, Chase and Clark of the Second Circuit affirmed dismissal of a damage claim but reversed dismissal

of the claim for maintenance and cure and remanded the case for further findings "particularly upon the issue of wilful misconduct" of libellant. (169 F. 2d 94), where Chief Office Kable had been injured in a fight with Chief Engineer Svedman, which occurred subsequent to Kable's having knocked Svedman unconscious with a gun (169 F. 2d 91). All judges agreed that "wilful misconduct" must be the precipitating cause, in order to bar maintenance and cure, Judges Hand and Chase voting to remand for further findings, but Judge Clark voting to award maintenance and cure without further findings.

In *Reck* v. *Pacific-Atlantic S.S. Co.*, C. C. A. 2, 180 F. 2d 866, Judges Augustus N. Hand, Clark and Frank affirmed a judgment for $46,000.00 damages and $1836.00 maintenance and cure where a seaman, suffering from delirium tremens "caused by severe alcoholic intoxication while at Venice" on shore leave, fell through a hatch when the carpenter, who was attending him, thought he was asleep and left him unattended for five minutes while the carpenter went fifteen feet away to a lavatory.

In the light of these cases, the decision herein must mean that appreciation for the aesthetic is to be outlawed for a seaman, on shore leave or on ship, and that, unless he is to lose his maintenance and cure right by mere momentary lack of considered carefulness, he must forego interest in natural beauty and indulge instead in drunkenness, brawling, reckless diving into near empty pools, shooting of sea lions and the like. This, despite the steadily pursued national policy to promote the cultural advancement as well as the welfare of seamen.

Otherwise, it must mean that all these decisions and *Aguilar* as well, are to be overruled, and the Convention rendered meaningless, through importing into the law of maintenance and cure a Vermont statutory theory of "gross

negligence", destroying completely the simplicity of maintenance and cure, with resulting litigation or forfeiture of every maintenance and cure claim.

POINT III

The Court erred in holding that recovery should be denied because to grant maintenance and cure would make the ship an insurer of the seaman's safety.

In thus ruling, the Court confused the rule applicable to indemnity but not maintenance and cure, as shown by its own decision in *Muruaga* v. *United States*, C. C. A. 2, 172 F. 2d 318, 320-321. Maintenance and cure does not involve indemnity, relating to safety or its opposite, damage.

Maintenance and cure is, in fact, as held in *Smith* v. *United States*, C. C. A. 4, 167 F. 2d, 550, 552, a species of "job insurance." The District Court had made arguments equivalent to that of the Court of Appeals herein (*The Robert Jordan, Smith* v. *United States*, D. C. E. D. Va., 74 F. Supp. 275, 277). In a dissent in *U. S.* v. *Brooks*, C. C. A. 4, 169 F. 2d 840, 848, Parker, *C. J.*, called maintenance and cure "a sort of accident and health insurance incident to the relationship." In a dissent in *Loverich* v. *Warner Co.*, C. C. A. 3, 118 F. 2d 690, 694, Clark, *C. J.*, said that it "is relational and provides a partial job insurance." The rights as expounded in the *Aguilar* and *Farrell* decisions represent practically insurance—not, indeed, of the seaman's safety, but of maintenance and cure.

CONCLUSION

The decision of the Court below involves questions of the greatest importance to seamen, upon which the Court of Appeals clearly erred; its decision is contrary to treaty, contrary to decisions of this Court and in conflict with decisions of other Circuits; and a writ of certiorari should be granted and the case should be reviewed and reversed by this Court.

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